(17,659.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, PLAINTIFF IN ERROR,

vs.

OCONTO CITY WATER SUPPLY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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1 To the Honorable John B. Cassoday, chief justice of the supreme court of the State of Wisconsin:

The petition of the National Foundry & Pipe Works, Limited, shows that in a suit pending in the circuit court of Oconto county, State of Wisconsin, wherein your petitioner was plaintiff and The Oconto City Water Supply Company was defendant, a judgment was entered, dated the 20th day of August, 1898, as follows:

"It is adjudged that the plaintiff has not and never had any lien on the water-works plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and title paramount to and free and clear of any claim or lien of the plaintiff; that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise.

It is further adjudged that this action be, and the same is hereby, dismissed for want of equity, and that the defendant do have and recover of and from the plaintiff the sum of sixty-three and $\frac{92}{100}$ dollars, its costs and disbursements in this action.

Dated August 20th, 1898.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*"

That thereafter your petitioner took an appeal to said supreme court of the State of Wisconsin from said judgment and from the whole thereof, said supreme court of the State of Wisconsin being the highest court of the State in which a decision could be had in said suit, and after the hearing thereof in said supreme court the said judgment of the circuit court of Oconto county was, on or about the 15th day of December, 1899, affirmed by the supreme court of the State of Wisconsin, the full record of which cause was at
2 the time of the affirmance of said judgment before said supreme court on appeal, and ever since then has remained and still remains before said court and under its control, and which record embraces the whole proceedings in said cause from the original service of process, including the original pleadings and amendments thereto, bill of exceptions, and record, and the whole of which record and proceedings is now before your honor for inspection and examination.

Your petitioner further shows that in said suit and final judgment entered therein there was drawn in question the validity of a title, right, and privilege derived by your petitioner and claimed by it under authority exercised under the United States and arising out of the decree of the United States circuit court for the eastern district of Wisconsin, dated October 3, 1892, rendered and entered in a certain cause therein pending, wherein your petitioner was complainant and The Oconto Water Company was defendant, whereby said complainant was decreed a lien upon the plant and property of said Oconto Water Company, which by said decree, together with the franchise of operating the same, was ordered sold by said court

and the proceeds of the sale thereof paid into the registry of the court for distribution among all who might show right thereto, and subject to the order of the court thereon; and under and pursuant to which said decree a sale was duly made and confirmed, vesting the right and title of said plant and property and franchise in your petititioner, as will more fully appear from the records and papers on file in this cause, and also arising under and by virtue of a decree rendered and entered in the United
3 States circuit court for the eastern district of Wisconsin in a cause depending therein, wherein your petitioner was complainant and the said Oconto City Water Supply Company and others were defendants, said decree being dated on the 17th day of July, 1895, and a decree on rehearing therein, dated July 29, 1897, wherein and whereby your petitioner was adjudged and given certain rights and privileges in and to the above-mentioned plant and property and franchises and the title thereto, all of which will more particularly appear in the records and proceedings herein, and the aforesaid supreme court of the State of Wisconsin has by its judgment herein, confirming the judgment of the circuit court of Oconto county, refused to give effect to the said several decrees so entered in the United States circuit court for the eastern district of Wisconsin upon the point in dispute, and the decision of which said supreme court of the State of Wisconsin is against the title, right, claim, and privilege set up and claimed by your petitioner under authority exercised under the United States and under the said several decrees of said United States court, and other decisions were in and by said judgment made, appearing in the assignment of errors herewith presented, a copy whereof is attached and made a part hereof, in all of which decisions manifest error hath happened, to the great damage of your petitioner, all of which appears in the record and proceedings in said suit now before you.

Wherefore your petitioner prays for a writ of error from the supreme court of the State of Wisconsin to the Supreme Court of
4 the United States, to the end that such errors, if any there be, may be corrected.

Dated this 2d day of February, 1900.

MILLER, NOYES, MILLER & WAHL,
Solicitors for National Foundry & Pipe Works, Limited.

GEO. H. NOYES, *Of Counsel.*

The statements and allegations of the foregoing petition found to be true, and the prayer thereof is granted, and the writ of error allowed, this 2d day of February, A. D. 1900.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

5 [Endorsed:] National Foundry & Pipe Works, Ld., *v.* Oconto City Water Supply Company. Petition for writ of error. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Filed Feb. 2, 1900. Clarence Kellogg, clerk of supreme court Wis.

6 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

The President of the United States of America to the chief justice and judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a final judgment in an appeal which is in the supreme court of the State of Wisconsin, the whole record in which appeal is before you, being the highest court of law or equity in the said State in which a decision could be had in said suit between National Foundry & Pipe Works, Limited, plaintiff and appellant, and The Oconto City Water Supply Company, defendant and respondent, wherein was drawn in question the validity and bindinf effect of a title, right, and privilege claimed by the said National Foundry & Pipe Works, Limited, under authority exercised under the United States and decrees duly entered in the circuit court of the United States for the eastern district of Wisconsin, the decision of the said supreme court of the State of Wisconsin was against the right and privilege specially set up by said National Foundry & Pipe Works, Limited, under said authority and decrees, a manifest error hath happened, to the great damage of the said National Foundry & Pipe Works, Limited, above-named, as by its complaint appears, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
7 Court of the United States, together with this writ, so that you have the same at Washington on the 4th day of March, next, in said Supreme Court, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 2d day of February, 1900, and of the Independence of the United States the one hundred and twenty-fourth.

EDWARD KURTZ,
Clerk U. S. Circuit Circuit for the Eastern District of Wisconsin.

Allowed by me this 2d day of February, 1900.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of Wisconsin.

8 STATE OF WISCONSIN, } *ss:*
Supreme Court, }

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

[Endorsed:] National Foundry & Pipe Works, Ld., *v.* Oconto City Water Supply Company. Writ of error. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Filed Feb. 2, 1900. Clarence Kellogg, clerk of supreme court Wis.

9 The United States of America to the Oconto City Water Supply Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 4th day of March, 1900, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, at the office of the clerk of said court, in the city of Madison, in the State of Wisconsin, wherein The National Foundry & Pipe Works, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John B. Cassoday, chief justice of the supreme court of the State of Wisconsin, this 2d day of February, in the year of our Lord one thousand and nine hundred.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

10 [Endorsed:] National Foundry & Pipe Works, Ld., *v* Oconto City Water Supply Co. Citation. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Service admitted this 6th day of February, 1900. Geo. G. Greene, att'y for defendant in error. Filed Feb. 8, 1900. Clarence Kellogg, clerk of supreme court Wis.

11 In Supreme Court of the United States.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff in Error,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant in Error.

Know all men by these presents that we, National Foundry and Pipe Works, Limited, principal, and the American Surety Company, a corporation organized under the laws of the State of New York and authorized to do business in the State of Wisconsin, and to execute this bond as surety, are held and firmly bound unto the Oconto City Water Supply Company, its successors and assigns, in the sum of five hundred dollars ($500), to be paid to said Oconto City Water Supply Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our and

each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated and executed this 2d day of February, 1900.

Whereas the above-named National Foundry and Pipe Works, Limited, hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in favor of the said obligee against the said National Foundry and Pipe Works, Limited, in the supreme court of the State of Wisconsin, directed to said court:

Now, therefore, the condition of this obligation is such that if the above-named National Foundry and Pipe Works, Limited, shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation
12 shall be void; otherwise the same shall be and remain in full force and virtue.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
By MILLER, NOYES, MILLER & WAHL,
[SEAL.] *Its Solicitors.*
AMERICAN SURETY COMPANY OF NEW YORK,
By J. M. W. PRATT, *Its Resident Vice-Pres't.*
Attest: A. A. HATHAWAY, *Its Resident Ass't Sec.*

In presence of—
C. R. JACKWITZ.
J. C. FINNEY.

I approve of the foregoing bond and of the sufficiency of the surety therein and accept the same as good and sufficient security upon the writ of error in the foreging entitled cause.

Dated February 2, 1900.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of Wisconsin.

13 Supreme Court of the United States, October Term, 1899.

NATIONAL FOUNDRY & PIPE WORKS, LIMITED, Plaintiff in Error,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant in Error.

Afterwards, to wit, on the 2d day of February, A. D. 1900, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said plaintiff in error above named, by its counsel, George H. Noyes, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

(1.) That the complaint of the plaintiff in error and the answer of the defendant in error in the matters therein contained are sufficient in law for said plaintiff in error to have and maintain said action

against said defendant in error and to be entitled to the relief prayed for in its complaint.

(2.) There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said defendant in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error.

(3.) There is also error in this, to wit, in said suit and the final judgment rendered therein there was drawn in question the
14 validity of a right, title, and privilege derived by said plaintiff in error from the United States of America, and claimed by it under an authority exercised under the United States, and the decision of the said supreme court of the State of Wisconsin was against the said title, right, and privilege set up and claimed by said plaintiff in error under such authority.

(4). There is also error in this, to wit, that said plaintiff in error claimed and was entitled to a title and right to the franchises, rights, and property set forth in its complaint under and by virtue of a decree duly rendered by the United States circuit court for the eastern district of Wisconsin on the 3d day of October, 1892, in which this plaintiff in error was complainant and The Oconto Water Company was defendant, and in and by virtue of a sale made under the said decree on the 23d day of August, 1897, and the deed of the United States marshal for the eastern district of Wisconsin to said plaintiff in error, conveying and transferring to it the rights, franchises, and property therein described, as the purchaser at the sale under said decree, and also by virtue of the order of said United States circuit court for the eastern district of Wisconsin in said action, made on the 28th day of August, 1897, confirming said sale and the report thereof, all of which proceedings are set forth in the complaint of said plaintiff in error aforesaid and the exhibits thereto attached, but which title, right, and privilege so claimed by said plaintiff in error and to which it was entitled under and by virtue of the aforesaid decree, sale, marshal's deed, and confirmation thereof in the proceedings in said action in said United
15 States circuit court for the eastern district of Wisconsin, was denied by the said supreme court of the State of Wisconsin herein, affirming the judgment of the circuit court of Oconto county, State of Wisconsin.

(5.) There is also error in this, to wit, that the circuit court of Oconto county in said action adjudged that said plaintiff in error had not and never had any lien on the water-works plant and property on which it claims such lien by its complaint in said action, and that the defendant in error holds and owns said plant and property by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error, and that the plaintiff in error is not entitled to any relief demanded in its complaint, as amended or otherwise, and that said action should be and was dismissed for want of equity, with costs against said plaintiff in error, and that said supreme court of the State of Wisconsin, being the highest court of said State in which a suit could be had, did affirm

on appeal the said judgment and the whole thereof so rendered by said circuit court of Oconto county.

(7.) There is also error in this, to wit, that said supreme court of the State of Wisconsin, in affirming the judgment so rendered herein by the circuit court of Oconto county, did deny to said plaintiff in error judgment against said defendant in error for the value of the pipe and materials mentioned in the complaint.

(8.) There is also error in this, to wit, that said supreme court of the State of Wisconsin, affirming the said judgment of the
16 circuit court of Oconto county, refused to give to said plaintiff in error the possession and use of the water plant and to enjoin said defendant in error from occupying, possessing, or using the same and any of the material furnished by said plaintiff in error, being a part of the water plant or system operated by said defendant in error, and to enjoin said defendant in error from occupying, possessing, or using said plant or said pipe so furnished by said plaintiff in error unless within a reasonable time, to be prescribed by the court, said defendant in error should pay to said plaintiff in error the amount due to it under its said decree dated October 3, 1892.

(9.) There is also error in this, to wit, that said supreme court of the State of Wisconsin held and decided that the said United States circuit court for the eastern district of Wisconsin, in said action wherein said plaintiff in error was complainant and The Oconto Water Company was defendant, did not have and acquire exclusive jurisdiction of the subject-matter of said suit, which drew to said court all questions regarding the rights and claims of all parties having claims against said property, and which by reason of said exclusive jurisdiction prevented the circuit court for Oconto county taking or acquiring any jurisdiction in the proceedings instituted in said court by S. D. Andrews and W. H. Whitcomb against the Oconto Water Company to foreclose their several mortgages upon the same plant and property, and to render any decree of foreclosure in said suit, and to order any sale of said property, and to confirm the referee's report of said sale, and to give any right, title, or possession to the purchaser at said sale by virtue of said foreclosure
17 proceedings.

(10.) There is also error in this, to wit, that said supreme court of the State of Wisconsin decided that the said United States circuit court for the eastern district of Wisconsin, in said action brought by said plaintiff in error against the Oconto Water Company to foreclose a mechanics' lien, did not acquire exclusive jurisdiction of the *res* in said suit, because it only took constructive possession of said *res* and did not have the actual custody thereof, and because the exclusive jurisdiction of said United States court in said action over the subject-matter thereof did not obtain, because there was no disturbance of an actual possession of the *res* in the said Andrews and Whitcomb instituting their said foreclosure proceedings to foreclose a mortgage upon the same property in the circuit court of Oconto county, Wisconsin.

(11.) There is also error in this, to wit, that the judgment herein

granted affirmative relief to said defendant in error, contrary to and beyond the allegations of the pleadings and in the absence of any cross-bill or other affirmative pleading on the part of the said defendant in error, thereby adjudging to said defendant in error that it holds and owns the said plant and property herein by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error.

(12.) There is also error in this, to wit, that said supreme court of the State of Wisconsin, affirming the judgment of the circuit court of Oconto county, State of Wisconsin, decided against the title, right, and privilege of the plaintiff in error which it claimed
18 under the authority exercised and granted to it by said mechanics' lien decree dated October 3, 1892, in that said court decided that the decision in the action commenced on or about the 5th day of October, 1896, in the circuit court of the United States for the eastern district of Wisconsin, wherein the plaintiff in error was the complainant and the said defendant in error, together with S. D. Andrews, W. H. Whitcomb, and others, were defendants, and the issues raised by the pleadings and therein determined were the same as are involved in this cause, and that said decision was *res adjudicata* in this case between the parties hereto.

(13.) There is also error in this, to wit, that said supreme court of the State of Wisconsin, affirming the judgment of the circuit court of Oconto county, decided that by virtue of the final decree entered in said United States circuit court for the eastern district of Wisconsin, in said cause wherein said plaintiff in error was complainant and said defendant in error, S. D. Andrews, and W. H. Whitcomb were defendants, dated July 29, 1897, this plaintiff in error did not hold or own said plant and property by claim or title paramount to that of said defendant in error, and did not have any claim or lien thereon, but, on the other hand, that said defendant in error under and by virtue of said decree held and owned said plant and property by claim and title paramount to and free and clear of any claim or lien of said plaintiff in error.

(14.) That there is also error in this, to wit, that said supreme court of the State of Wisconsin, affirming the judgment of the circuit court of Oconto county, decided against the right, title,
19 and privilege claimed by and given to it under and by virtue of the authority exercised under it in that certain suit referred to in the answer of the said S. D. Andrews and W. H. Whitcomb, which was filed in said action brought in the United States circuit court for the eastern district of Wisconsin, wherein this plaintiff in error was complainant and said defendant in error, S. D. Andrews, and W. H. Whitcomb and others were defendants, which said suit was instituted by said plaintiff in error and was pending in the United States circuit — for the eastern district of Wisconsin, wherein this plaintiff in error was complainant and The Oconto Water Company was defendant and the said S. D. Andrews and W. H. Whitcomb were garnishees, and which action had been commenced prior to the institution of the last above mentioned action in the United States circuit court for the eastern district of Wisconsin, and in which

said garnishee action said United States circuit court for the eastern district of Wisconsin had taken jurisdiction of the *res*, being the plant and property referred to herein and being the same plant and property which were the subject-matter of the foreclosure proceedings instituted in the circuit court of Oconto county, State of Wisconsin, by said Andrews and Whitcomb against said Oconto Water Company, by virtue of which and the sale made under the decree therein defendant in error claims to hold the title to said plant and property as against the claim of right and title thereto asserted by said plaintiff in error.

(15.) There is also error in this, to wit, that said supreme court of the State of Wisconsin and the said circuit court of Oconto
20 county did refuse to give effect to the said judgments of the United States circuit court for the eastern district of Wisconsin referred to, mentioned, and described in this record and hereinbefore mentioned, the same having been rendered upon the question involved herein, — a decision was made against the title and right set up by said plaintiff in error, which is claimed under and by virtue of said judgments of the United States circuit court for the eastern district of Wisconsin.

(16.) There is also error in this, that the plaintiff in error, under the statutes of Wisconsin and the decree in the mechanics' lien suit in the Federal court construing and enforcing the same and the proceedings under said decree, whereby the plaintiff in error became the purchaser of the plant and property mentioned in the decree and its title thereto confirmed by said court, obtained a vested interest in and title to said plant and property which could not be divested by any subsequent decision of the supreme court of the State of Wisconsin construing the said statutes in a different manner and so as to deprive said plaintiff in error of its said vested title and interest, and that said judgment of said supreme court of the State of Wisconsin herein was a holding against such right and title so vested in said plaintiff in error and in favor of said defendant in error.

Wherefore the plaintiff in error herein prays that the judgment of the supreme court of Wisconsin aforesaid and of the said circuit court of Oconto county made final, as aforesaid, may be re-
21 versed, annulled, and altogether held for nothing, and that said plaintiff in error may be restored to all things which it has lost by occasion of said judgment.

MILLER, NOYES, MILLER & WAHL,
Solicitors for Plaintiff in Error.

GEO. H. NOYES, *Of Counsel.*

The aforesaid assignments of error were duly presented to me this 2d day of Feb., 1900, before allowing the writ of error in such cause of even date.

JOHN B. CASSODAY,
Chief Justice of the Supreme Court of the State of Wisconsin.

22 [Endorsed:] Supreme Court of the United States. National Foundry & Pipe Works, Ld., *v.* Oconto City Water Supply Company. Assignments of error. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Filed Feb. 2, 1900. Clarence Kellogg, clerk of supreme court Wis

23 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the eighth day, of August, A. D. 1899.

Present: John B. Cassoday, chief justice; John B. Winslow, Roujet D. Marshall, Charles V. Bardeen, and Joshua Eric Dodge, justices; Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, came into the office of the clerk of the supreme court of the State of Wisconsin, National Foundry and Pipe Works, Limited, by its attorneys, and filed in said court its certain notice of appeal and undertaking, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Oconto county, in said State, in the words and figures following—that is to say:

24 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

To W. H. Webster, Esq., attorney for defendant, and Charles D. Post, clerk of the aforesaid court:

Please take notice that the plaintiff above named appeals to the supreme court of the State of Wisconsin from the judgment rendered by the above-named court herein, entered on the 20th day of August, A. D. 1898, in favor of the defendant and against the plaintiff, and from the whole and every part thereof.

Yours, etc.,
MILLER, NOYES, MILLER & WAHL,
Attorneys for Plaintiff.

(Endorsements:) Notice of appeal to supreme court. Oconto county, Wis. Filed in office of clerk of circuit court May 31, 1899. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

25 STATE OF WISCONSIN,
DEPARTMENT OF INSURANCE.

The National Surety Company, located at New York, in the State of New York, having furnished to the undersigned commissioner of insurance due proof of its possessing the qualifications required by

the laws of the State of Wisconsin relating to suretyship corporations, and having complied with said laws:

Now, therefore, this is to certify that said National Surety Company has qualified and is authorized to transact within this State the business of a suretyship corporation under the statutes of this State until the first day of March, A. D. 1900, unless this certificate be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this first day of March, A. D. 1899.

[SEAL.] EMIL GILJOHANN,
Commissioner of Insurance.

I, Emil Giljohann, commissioner of insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority number 7 issued to the National Surety Company and on file in my office, and that the same is a true copy of said original and of the whole thereof.

Witness my hand and official seal, at Madison, Wisconsin, this third day of March, A. D. 1899.

[SEAL.] EMIL GILJOHANN,
Commissioner of Insurance.

[U. S. revenue stamp, 10 cents]

26 (Endorsements:) Oconto county, Wis. Filed in office of clerk of circuit court May 31, 1899. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

27 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Whereas, on the 20th day of August, A. D. 1898, in the circuit court of Oconto county, The Oconto City Water Supply Company, the above-named respondent, recovered a judgment against National Foundry and Pipe Works, Limited, the above-named appellant, for sixty-three and $\frac{92}{100}$ (63.92) dollars, costs, and dismissing the complaint in said action, and the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment

shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal.

Executed this 29th day of May, A. D. 1899.

NATIONAL SURETY COMPANY,
By WM. REGETNER, *Res. Vice-Pres't, and*
[SEAL.] ROBERT CAMP, *Res. Ass't Sec'y.*

Witness-:
P. O. KANNEBERG.
CHAS. J. ARNOLD.

28 (Endorsements:) Oconto county, Wis. Filed in office of clerk of circuit court May 31, 1899. Chas. D. Post, clerk. Circuit court, Oconto county. National Foundry and Pipe Works, Limited, plaintiff, *vs.* Oconto City Water Supply Company, defendant. Notice and undertaking on appeal. Service admitted this 29th day of May, 1899. W. H. Webster, att'y for def't. Service admitted this 31st day of May, 1899. Chas. D. Post, clerk of circuit court for Oconto county.

29 STATE OF WISCONSIN:

Superior Court, Milwaukee County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

P. O. address, 102 Wisconsin street, Milwaukee, Milwaukee county, Wis.

(Endorsements:) Summons. Oconto county, Wis. Filed in office of clerk of circuit court Jan. 8, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

30 STATE OF WISCONSIN, } ss:
Oconto County, }

I, Albert Rusch, sheriff of Oconto county, Wisconsin, do hereby certify that on the 24th day of November, 1897, I personally served the within summons and annexed complaint on the defendant, The Oconto City Water Supply Company, by delivering to and leaving with S. W. Ford, the secretary of the said company, a true and cor-

rect copy of said summons and complaint, and that I endorsed on said summons the date of such service over my official signature.

ALBERT RUSCH,
Sheriff of Oconto County, Wisconsin.

Fees.

Service	$1.00
Mileage	20
47 folios	4.70
	5.90

(Endorsements:) Oconto county, Wis. Filed in office of clerk of circuit court Jan. 8, 1898. Chas. D. Post, clerk. Filed June 7, 1899. Clarence Kellogg, clerk of supreme court Wis.

31 Superior Court, Milwaukee County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

The above-named plaintiff, by Miller, Noyes, Miller & Wahl, its attorneys, for its complaint herein alleges:

That at the times hereinafter mentioned said plaintiff was and now is a limited copartnership, organized and existing under and by virtue of the laws of the State of Pennsylvania, and authorized to do business, acquire and hold property, and sue in said name, and that said Oconto City Water Supply Company was and is a corporation organized on or about the 7th day of July, A. D. 1892, under and pursuant to the provisions of section 1788 of the Revised Statutes of Wisconsin, for the express and only purpose, as stated in its said articles of organization, as follows, to wit:

"For the purchase of S. D. Andrews and W. H. Whitcomb, both of the village of Norway, Oxford county, in the State of Maine, and of enjoying, maintaining, and operating all of the rights, powers, immunities, franchises, and property of every kind, name, or nature, both real and personal, acquired and now owned and held by them under and by virtue of a decree of foreclosure and sale, made, rendered, and entered in the circuit court of Oconto county, State of Wisconsin, on the 13th day of August, A. D. 1891, in a certain action heretofore commenced and then pending in said court, wherein said S. D. Andrews and W. H. Whitcomb were plaintiffs and Oconto Water Company was defendant, and of a sale made thereunder to the said S. D. Andrews and W. H. Whitcomb, on the 12th day of September, A. D. 1891, by one William K. Smith, a referee
32 appointed in and by said decree to make such sale of such rights, powers, privileges, immunities, franchises, and property, which, taken together, compose the plant or system of water works in the city of Oconto aforesaid, constructed therein under ordinance No. 153 of said city of Oconto by the Oconto Water Com-

pany, a corporation organized under the laws of Wisconsin, all of which were transferred or conveyed to the said S. D. Andrews and W. H. Whitcomb by the said William K. Smith, referee as aforesaid, by a certain written instrument bearing date September 12th, A. D. 1891, executed by the said William K. Smith, referee as aforesaid, and acknowledged by him September 28th, A. D. 1891, which instrument was thereafter and on the 29th day of September, A. D. 1891, duly recorded in the office of the register of deeds in and for said county of Oconto, Wisconsin, in volume 52 of deeds thereon, on page 563."

That in and by said articles of incorporation it was further provided that when said defendant should have acquired corporate existence it might make and enter into a contract with the said S. D. Andrews and W. H. Whitcomb for the purchase of them and transfer by them to it in legal manner all the rights, powers, privileges, immunities, franchises, and property hereinbefore referred to, acquired by them as hereinbefore stated, upon such terms and conditions as might be agreed upon between them and said defendant, and if any of such terms and conditions should provide for the payment to them of any part of the purchase price thereof in stock of said defendant they, as a joint concern, might subscribe upon the books of said defendant for such amount of its stock as might be agreed by them to be received in such part payment, and the amount of stock so subscribed by them should, upon demand, after they should have assigned, transferred, set over, and conveyed to said defendant such rights, powers, privileges, immunities, franchises, and property, be issued and delivered to them as full paid and non-assessable stock.

33 Said plaintiff further alleges that heretofore and on or about the 28th day of August, 1890, it agreed to sell and deliver to the said Oconto Water Company, a corporation organized under the laws of Wisconsin, the iron pipe necessary to be used by it in the construction of its water-works plant in the city of Oconto, Wisconsin, and thereupon at various dates between the 8th day of September, A. D. 1890, and the 24th day of November, A. D. 1890, it delivered to the Oconto Water Company, at the city of Oconto, Wisconsin, the iron pipe which was necessary to be used, and which was used, in the construction of said water plant.

That, said Oconto Water Company having failed and neglected to pay for said pipe, said plaintiff on or about the 28th day of January, A. D. 1891, duly filed its claim for a lien in the office of the clerk of the circuit court of said Oconto county, Wisconsin, for the amount due and owing from said Oconto Water Company on account of the sale and delivery of said pipe, and thereafter and on or about the 30th day of January, A. D. 1891, filed its bill of complaint in the United States circuit court for the eastern district of Wisconsin for the purpose of foreclosing its lien against the said pipe and the plant of said Oconto Water Company, and thereafter such proceedings were had in said court that on the 3d day of October, 1892, a decree was entered in said circuit court of the United States for the eastern district of Wisconsin—a copy of which decree is hereto attached,

marked Exhibit D, and made a part hereof—adjudging due to said plaintiff on account of said pipe so furnished by it to said defendant the sum of twenty-four thousand two hundred fifty and $\frac{4}{100}$ dollars ($24,250.04), with interest thereon from the second day of January, A. D. 1892, at the rate of seven per cent. per annum, together with the sum of one hundred nine and $\frac{45}{100}$ dollars ($109.45), costs and disbursements, amounting in all to the sum of twenty-five thousand six hundred thirty-seven and $\frac{32}{100}$ dollars
34 ($25,637.32), and further adjudging the amount so due to be a lien upon the well, buildings, machinery, and entire water-works plant of said Oconto Water Company, including the pipe so furnished by it and unpaid for, and upon the right, title, and interest which the said Oconto Water Company had in and to the lands and property upon which said building and water-works plant were located, on and after the 15th day of September, A. D. 1890, and further adjudging that said well, buildings, machinery, and water-works plant and all the right, title, and interest of said Oconto Water Company in and to the premises upon which the same were located, together with the franchise of maintaining and operating the said plant for the uses to which it was devoted by the law of the incorporation of said Oconto Water Company as an entirety, be sold at public auction by the marshal of said court, and barring and foreclosing all right, title, and interest of said Oconto Water Company and all persons claiming under it in and to the said premises and property so to be sold; that thereafter and on the 23d day of August, 1897, pursuant to the terms of said decree the said marshal, after giving due notice of the time and place of such sale, sold all the rights and property mentioned in said decree to said plaintiff, and thereafter and on or about the 27th day of August, 1897, said marshal duly executed and delivered to said plaintiff a deed of the property, premises, and franchises so sold, and on the 28th day of August, 1897, filed in the office of the clerk of the said United States circuit court for the eastern district of Wisconsin his report of sale, which said sale and report thereof were on the 28th day of August, 1897, confirmed by said court, and the said marshal's deed executed and delivered, as aforesaid, was duly recorded in the office of the register of deeds of the county of Oconto, Wisconsin, on the 30th day of August, A. D. 1897, in volume 70 of deeds, on pages 445 and 446, a copy of which deed is
35 hereto attached, marked Exhibit B, and made a part hereof.

That by virtue of said mechanics' lien decree and said sale and said marshal's deed this plaintiff became and now is the owner and holder of all the right, title, and interest which said Oconto Water Company had or has since acquired in and to said water plant and all the property and franchises belonging to or connected therewith on and since the 15th day of September, A. D. 1890, which title to said plant said plaintiff alleges is prior to any lien upon or title to said plant now or at any time held or acquired by said defendant; that the title to the real estate mentioned and described in said mechanics' lien decree and said marshal's deed was at the date

of the completion of said water plant by said Oconto Water Company and the acceptance thereof by the city of Oconto on the 28th day of September, A. D. 1891, and at all times prior thereto in the city of Oconto, and that a conveyance thereof was not made to said Oconto Water Company until the 31st day of January, A. D. 1894, when said city, in consideration of the sum of one thousand and seventy dollars ($1,070) paid to it from the earnings of said water plant, executed and delivered a deed of said real estate to said Oconto Water Company.

Said plaintiff further alleges that on or about the 18th day of September, A. D. 1890, said Oconto Water Company executed and delivered a certain instrument in writing, bearing date the 13th day of September, A. D. 1890, to the above-named S. D. Andrews and W. H. Whitcomb, whereby said company purported to mortgage or pledge to them all the rights, privileges, immunities, franchises, and powers which were granted unto it by a certain ordinance passed by the common council of the city of Oconto authorizing said company to construct, operate, and maintain water works therein to secure the payment of certain sums of money to be thereafter advanced by said Andrews and Whitcomb to said Oconto Water Company.

36 That thereafter and on or about the 13th day of March, 1891, said Oconto Water Company executed and delivered to said Andrews and Whitcomb a second mortgage or pledge of said ordinance rights and franchises to secure the payment of an additional loan of money to be made to it by said Andrews and Whitcomb.

That thereafter and on or about the 17th day of June, 1891, the said S. D. Andrews and W. H. Whitcomb commenced suit in the circuit court of said county of Oconto, Wisconsin, against said Oconto Water Company for the purpose of foreclosing said mortgages or pledges, and thereafter such proceedings were had therein that on or about the 13th day of August, 1891, a judgment of foreclosure and sale was entered, and thereafter and on or about the 12th day of September, 1891, a sale was made under said judgment of foreclosure, whereby the said S. D. Andrews and W. H. Whitcomb became the purchasers of the said ordinance rights and franchises so mortgaged or pledged to them, as aforesaid.

That after such purchase by them they entered into possession of said entire water plant, including the pipe so furnished by the said plaintiff to said Oconto Water Company, and so continued in possession thereof until, as this plaintiff is informed and believes, on or about the 25th day of July, A. D. 1892, when the said Andrews and Whitcomb transferred to said defendant all their right, title, and interest in the said ordinance rights and franchises so purchased by them under said judgment of foreclosure and sale, and thereupon said defendant took possession of said entire water plant or system so constructed by said Oconto Water Company, including the pipe furnished by this plaintiff to said Oconto Water Company, and has since continued — the possession and use and received the rents, issues, and profits of said plant and of said pipe as a part thereof, and is now in possession and use of all of the same.

This plaintiff further alleges that at and prior to the mak-
37 ing of both said mortgages or pledges the said Andrews and Whitcomb had knowledge or notice of the fact that said plaintiff had furnished the pipe used in the construction of said water plant and had not paid for the same, and that at and prior to the commencement of said foreclosure suit in said circuit court of Oconto county to foreclose said mortgages or pledges said Andrews and Whitcomb had knowledge or notice that said plaintiff had filed its claim for a mechanics' lien against the same and the said water plant, and had commenced proceedings in said circuit court of the United States for the eastern district of Wisconsin for the enforcement of said lien, and that they had such knowledge at the time that they took possession of said water plant after the sale under their said foreclosure judgment, and also at the time they caused to be organized the said defendant and transferred to it all their right, title, and interest in the said ordinance franchises, and rights so purchased by them; and this plaintiff further alleges that said defendant, its officers and agents, at the time it took possession of said water-works plant, including the pipe furnished therefor by said plaintiff, and at all times since, had knowledge or notice that said plaintiff had not been paid for said pipe, and that it had taken due proceedings to enforce a mechanics' lien therefor against said pipe and against the plant of said Oconto Water Company.

Said plaintiff further alleges that said Andrews and Whitcomb, at the time of the sale to them under their foreclosure judgment, paid in cash only a few dollars to defray the expenses of said sale, but were credited upon their bid and allowed in payment thereof the amount adjudged due them under their said mortgages or pledges.

Said plaintiff further alleges that upon the sale by said Andrews and Whitcomb to said defendant of the rights and interests
38 purchased by them under their said judgment the consideration therefor was not paid in cash, but that said Andrews and Whitcomb received in consideration of said conveyance the capital stock of said defendant, as provided in its articles of incorporation.

Said defendant further alleges that it has not been paid for the pipe so furnished to said Oconto Water Company, and that it is still the owner and holder of all the right, title, and interest in and to the said pipe and the said plant obtained under and by said mechanics' lien and said marshal's deed, as hereinbefore set out, and that said defendant has availed itself of the property of said plaintiff with knowledge that said plaintiff has not been paid therefor, and has entered into the possession and use and has since continued to occupy and use and is now occupying and using the same and the said plant which it now has in its possession and claims to own and control.

Wherefore said plaintiff demands judgment that the possession and use of said plant be given to it, and that said defendant, its officers, servants, and agents, may be perpetually enjoined from occupying, possessing, or using the same and any of the pipe so furnished by said plaintiff and being a part of the water plant or

system now operated by it, or that said defendant, its officers, servants, and agents, may be enjoined from occupying, possessing, or using said plant or any of the pipe so furnished by said plaintiff for said plant, unless within such reasonable time as said court may prescribe for that purpose said defendant shall pay to said plaintiff the amount due to it under its mechanics' lien decree, as hereinbefore set forth, and said plaintiff prays for such other, further, or different relief as to the court shall seem just and proper, and for the costs of this action.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

39 STATE OF PENNSYLVANIA, } ss:
County of Westmoreland, }

J. D. Hill, being duly sworn, says that he is the secretary of the above-named plaintiff, and makes this verification on its behalf; that he has read the foregoing complaint and knows the contents thereof, and verily believes the same to be true; that the reason that this verification is not made by plaintiff is that it is a limited copartnership organized under the laws of the State of Pennsylvania; that affiant's information and the grounds of his belief are derived from copies of the records and proceedings of the actions referred to in said complaint and from information received by him and from his relations to and dealings with the parties as the secretary of said plaintiff.

J. D. HILL.

Subscribed and sworn to before me this 13th day of November, 1897.

JOHN RUTHERFORD,
[SEAL.] *Notary Public, Westmoreland County, Pennsylvania.*

Oconto county, Wis. Filed in office of clerk of circuit court Jan. 8, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk supreme court Wis.

40 (EXHIBIT D.)

In the Circuit Court for the Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LTD., Complainant, }
vs. }
OCONTO WATER COMPANY, Defendant. }

This cause having been heretofore heard and argued by counsel, thereupon, and upon consideration thereof, it is ordered, adjudged, and decreed that the amount due to the said complainant from the said defendant on account of materials furnished by said complainant to said defendant is the sum of twenty-four thousand two hundred and fifty and $\frac{4}{100}$ dollars ($24,250.04), with interest thereon from the second day of January, A. D. 1892, at the rate of seven per

cent. per annum, together with the sum of one hundred and nine dollars and forty-five cents for costs and disbursements in this cause, amounting in all to the sum of twenty-five thousand six hundred and thirty-seven dollars and thirty-two cents, and that the aforesaid sums are a lien, under chapter 143 of the Revised Statutes of 1878 of the State of Wisconsin and the acts amendatory thereof, upon the well, buildings, machinery, and the entire water-works plant of said defendant in the city of Oconto, Wisconsin, and upon all the right, title, and interest which the defendant, Oconto Water Company, had in and to the premises hereinafter described from and after the date of the commencement of the construction of said well, buildings, machinery, and water-works plant upon which said lien is claimed, to wit, the 15th day of September, 1890, or which said defendant or any and all persons claiming under it have since acquired therein.

It is further ordered, adjudged, and decreed that the afore-
41 said well, buildings, machinery, and entire water-works plant, and all the aforesaid right, title, and interest of the said defendant or of any person claiming under it in and to the premises upon which said plant is located, hereinafter described, and the franchise of maintaining and operating the said plant for the uses to which it is devoted by the law of the defendant's incorporation as an entirety, be sold at public auction by or under the direction of the marshal of this court; that said marshal give public notice of the time and place of such sale in the manner provided by the statutes of the State of Wisconsin for the sale of real estate on execution, and that such sale be absolute without redemption; that said marshal make, execute, and deliver to the purchaser or purchasers, on compliance with the terms of such sale, a deed or deeds of the property and premises so sold, setting forth the property and land so sold and the sum paid therefor, and that he bring the proceeds of such sale, after deducting the amount of his fees and expenses of such sale, into the registry of this court for distribution among all who may show right thereto and subject to the order of the court thereon; that said marshal make a report of such sale and file the same with the clerk of this court within ten days from the date of the sale.

It is further ordered, adjudged, and decreed that after the filing of said report of sale and the confirmation thereof the defendant, Oconto Water Company, and all persons claiming under it, or any or either of them, be, and they are, and each of them is hereby, forever barred and foreclosed of all right, title, interest, and equity of redemption in and to said premises so sold, or any part thereof.

The following is a description of the real estate hereinbefore mentioned and upon which said lien is established, to wit:

Part of lot five (5), in section nineteen (19), town twenty-
42 eight (28) north, of range twenty-two (22) east, in the city of Oconto, county of Oconto and State of Wisconsin, viz: Commencing at the southwest corner of the Denny lot, on the east line of State street, thence south along the east line of State street one hundred and twenty-seven (127) feet to the north line of Chicago street extended, thence east twelve (12) rods to the Schufeldt lot,

thence north along west line of Schufeldt lot twenty-two (22) rods, thence west four (4) rods, thence south sixteen (16) rods, thence west eight (8) rods to the place of beginning, and also all the right, ttitle, and interest which said Oconto Water Company had in and to any other premises upon which its said plant or any part thereof is located.

October 3, 1892.

(Signed) JAS. G. JENKINS, *Judge.*

43 (EXHIBIT B.)

This indenture, made this 27th day of August, A. D. 1897, between George W. Pratt, United States marshal for the eastern district of Wisconsin, of the first part, and the National Foundry and Pipe Works, Limited, a corporation of the State of Pennsylvania, of the second part.

Whereas, in and by a certain decree made on the 3d day of October, 1892, by the United States circuit court for the eastern district of Wisconsin, in equity, in a certain cause pending in said court wherein The National Foundry and Pipe Works, Limited, was complainant, and The Oconto Water Company was defendant, it was among other things ordered, adjudged and decreed that the said marshal should sell at public auction, upon giving due notice of the time and place of such sale in the manner provided for in said decree, all and singular the lands, premises, property and franchises described in the said decree and hereinafter mentioned, and that upon compliance with the terms of such sale a deed therefor should be given by said marshal to the purchaser at such sale.

And whereas the said marshal, having given due notice of the time and place of sale, did, on the 23d day of August, 1897, sell at public auction at the court-house in the city of Oconto, county of Oconto, State of Wisconsin, the lands, premises, property and franchises described in the said decree, and the same were then and there struck off to the said party of the second part for the sum of five hundred dollars ($500), that being the highest sum bid therefor, and the said decree having been thereby duly carried out:

Now this indenture witnesseth: that the said marshal, party of the first part, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said decree and in conformity to the statute and the practice in such case, and also in consideration of the premises and of the sum of money so paid as aforesaid,

44 the receipt whereof is hereby acknowledged, has bargained, sold, assigned and conveyed, and by these presents does bargain, sell, assign and convey unto the said party of the second part, its successors and assigns forever, the following-described property, to wit:

The well, buildings, machinery and entire water-works plant of said Oconto Water Company situated in the city of Oconto, Wisconsin, and all the right, title and interest of the said defendant Oconto Water Company or any person claiming under it in and to the premises upon which said plant is located, hereinafter described, and the franchise of maintaining and operating the said plant for

the uses to which it is devoted by the law of the incorporation of said Oconto Water Company, as an entirety, together with all the right, title and interest which said defendant Oconto Water Company had in and to the premises hereinafter described on, from and after the 15th day of September, A. D. 1890, or which said defendant Oconto Water Company or any and all persons claiming under it have since said 15th day of September, A. D. 1890, acquired therein, said premises and real estate upon which the aforesaid plant, its well, buildings and machinery are located, being described as follows, to wit:

Part of lot five (5) in section nineteen (19), town twenty-eight (28), north of range twenty-two (22) east, in the city of Oconto, county of Oconto and State of Wisconsin, viz: Commencing at the southwest corner of the Denny lot on the east line of State street, thence south along the east line of State street one hundred and twenty-seven (127) feet to the north line of Chicago street extended, thence east twelve (12) rods to the Shufeldt lot, thence north along west line of Shufeldt lot twenty-two (22) rods, thence west four (4) rods, thence south sixteen (16) rods, thence west eight (8) rods to the place of beginning, and also all the
45 right, title and interest which said Oconto Water Company had in and to any other premises upon which its said plant, or any part thereof, is located.

To have and to hold all and singular the premises, property and franchises above mentioned and described and hereby conveyed or intended to be conveyed unto the said party of the second part, its successors and assigns, to its and their only proper use, benefit and behoof forever.

In witness whereof the said marshal, party of the first part, has hereunto set his hand and seal the day and year first above written.

GEO. W. PRATT, [SEAL.]
United States Marshal for the Eastern District of Wisconsin.

Sealed and delivered in presence of—
WM. D. LUSHER.
S. J. EBERT.

STATE OF WISCONSIN, } ss:
County of Winnebago, }

On this 27th day of August, A. D. 1897, before me personally appeared George W. Pratt, United States marshal for the eastern district of Wisconsin, to me known to be said marshal mentioned and described in the foregoing instrument and the person who executed the same, and acknowledged that he executed the same as such marshal freely and voluntarily for the uses and purposes therein expressed.

WM. D. LUSHER,
[NOTARIAL SEAL.] *Notary Public, Wisconsin.*

46 (Endorsements:] 15633. Superior court, Milwaukee county. National Foundry and Pipe Works, Limited, *vs.* Oconto City

Water Supply Company. Summons and complaint. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Filed December 28, 1897. A. W. Hill, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

47 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

The defendant answers the complaint herein as follows:

First. It admits the copartnership character of the plaintiff and the corporate character of the defendant and of Oconto Water Company mentioned in the complaint, all as therein stated.

Second. It has no knowledge or information sufficient to form a belief as to whether the plaintiff ever agreed to or did sell or deliver to said Oconto Water Company any iron pipe, or whether said company used in the construction of the water plant mentioned in said complaint any iron pipe sold or delivered to it by the plaintiff. On the contrary, it alleges upon information and belief that the only iron pipe ever purchased by said Oconto Water Company or used by it in the construction of its said water plant was sold and delivered to it by a corporation bearing the same title as that of the plaintiff.

Third. It denies that the plaintiff ever filed or caused to be filed in the office of the clerk of the circuit court of Oconto county, Wisconsin, any claim for a lien upon any of the property described in the complaint herein, or that it ever filed its bill of complaint in the United States circuit court for the eastern district of Wisconsin for the purpose of foreclosing any lien against said pipe or plant of said Oconto Water Company.

Fourth. It admits that on the 3rd day of October, 1892, a decree was entered in the circuit court of the United States for the eastern district of Wisconsin, of which Exhibit "D" of the complaint
48 herein is a copy, but it alleges that such decree was made in an action wherein the sole complainant was a corporation bearing the same title as that of the plaintiff. It admits that on the 23rd day of August, 1897, the marshal of said court made a pretended sale and deed of the property described in such deed, and on the 28th day of August, 1897, filed in the office of the clerk of the United States circuit court for the eastern district of Wisconsin his report of such sale, and that said pretended sale and the report thereof were, in form, on the 20th day of August, 1897, confirmed by said court, and that said deed was thereafter recorded in the office of the register of deeds of the county of Oconto, Wisconsin, all as stated in said complaint, and that Exhibit "B" of said complaint is a copy of said deed.

Fifth. It admits that the title to the real estate mentioned and described in said decree and marshal's deed was, at the date of the completion of said plant and of the acceptance thereof by the city of Oconto mentioned in said complaint, and at all times prior thereto,

in the city of Oconto, and that a conveyance thereof was not made to said Oconto Water Company until the 31st day of January, A. D. 1894, when said city, in consideration of the sum of $1,070, paid to it from the earnings of said water plant, executed and delivered a deed of said real estate to said Oconto Water Company.

Sixth. It admits that said Oconto Water Company executed and delivered to said S. D. Andrews and W. H. Whitcomb the instruments in writing bearing date Sept. 13, 1890, and March 13, 1891, mentioned in said complaint.

Seventh. It admits that on or about the 17th day of June, 1891, the said S. D. Andrews and W. H. Whitcomb commenced suit against said Oconto Water Company in the circuit court of said county of Oconto, Wisconsin, for the purpose of foreclosing said instruments, and that thereafter such proceedings were had in said suit that
49 on or about the 13th day of August, 1891, a judgment of foreclosure and sale was entered, and that thereafter and on or about the 12th day of September, 1891, a sale was made under said judgment, whereby the said S. D. Andrews and W. H. Whitcomb became the purchasers, and, this defendant alleges, were given a deed in due form, by virtue of which they became the owners of the property mortgaged and pledged to them by said instruments.

Eighth. It admits that after making such purchase and receiving such deed the said S. D. Andrews and W. H. Whitcomb entered into possession of said entire water plant, including all pipe constituting any portion of said plant, and continued in such possession until on or about the 25th day of July, A. D. 1892, when they transferred to the defendant all their right, title, and interest in the ordinance rights and franchises so purchased by them under said judgment of foreclosure and sale, and that thereupon this defendant took possession of said entire water plant or system so constructed by said water company, including all pipe constituting any portion of the same, and has since continued in such possession, using the same and receiving the rents, issues, and profits thereof.

Ninth. That it has no knowledge or information sufficient to form a belief as to whether at or prior to the making of either of said mortgages or pledges by said Oconto Water Company to said Andrews & Whitcomb, as stated in said complaint, the said Andrews & Whitcomb or either of them had any knowledge or notice that the plaintiff had furnished any of the pipe used in the construction of said water plant or had not been paid for the same, or that at or prior to the commencement of their foreclosure suit in said circuit court of Oconto county to foreclose said mortgages or pledges said Andrews & Whitcomb or either of them had any knowledge or notice that plaintiff had filed any claim for a lien against any of said property or had commenced proceedings in said cir-
50 cuit court of the United States for the eastern district of Wisconsin for the enforcement of any lien thereon, or that they or either of them had any such knowledge at the time they took such possession of said water plant or at the time they transferred to this defendant their right, title, and interest in the said ordinance franchises and rights so purchased by them.

Tenth. It denies that it or any of its officers or agents, at the time it took possession of said water plant or at any time since, until the commencement of this action, had any knowledge or notice that the plaintiff had not been paid for any pipe furnished by it to said Oconto Water Company, or that it had taken any proceedings to enforce a lien therefor against any such pipe or the plant of said Oconto Water Company.

Eleventh. It admits that said Andrews & Whitcomb, at the time of such sale to them under their foreclosure judgment, paid in cash only a few dollars to defray the expenses of said sale, and that they were credited upon their bid made at such sale and allowed in payment thereof the amount adjudged due them under their said mortgages or pledges.

Twelfth. It admits that upon the sale to it by said Andrews & Whitcomb of the rights and interests purchased by them under their said judgment the consideration therefor was not paid in cash, but that said Andrews & Whitcomb received in consideration of said conveyance a portion of this defendant's stock.

Thirteenth. It denies that the plaintiff is the owner or holder of any right, title, or interest in or to said water plant or any pipe constituting any part of said plant.

Fourteenth. It denies that it has availed itself of any property of the plaintiff with or without knowledge that the plaintiff has not not been paid therefor.

Fifteenth. It admits that it entered into the possession and
51 use and has ever since continued to occupy and use the water plant so constructed by said Oconto Water Company and of all property constituting any part of said plant or appurtenant thereto necessary for its operation and enjoyment, and that it claims to and it alleges that it does in fact own and control the same .

Sixteenth. That, save as hereinbefore stated, admitted, or qualified, no allegation of the complaint herein is true.

W. H. WEBSTER,
Attorney for Defendant.

GEORGE G. GREENE, *Of Counsel.*

STATE OF WISCONSIN, } ss:
Oconto County, }

S. W. Ford, being first duly sworn, deposes and says that he is secretary of the defendant corporation in the foregoing entitled action and makes this verification for and on behalf of said defendant.

That he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

S. W. FORD.

Subscribed and sworn to before me on this 17th day of February, 1898.

D. G. CLASSON,
Circuit Court Com'r in and for Oconto Co., Wis.

(Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Ltd., pl'ff, *v.* Oconto City Water Supply Co., def't. Answer (original). W. H. Webster, att'y for def't. Geo. G. Greene, of counsel. Oconto county, Wis. Filed in office of clerk of circuit court Aug. 24, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

52 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Now comes the above-named plaintiff, by Miller, Noyes, Miller & Wahl, its attorneys, and moves to amend plaintiff's complaint herein as follows:

First. By inserting in the fourth line, after the title on the first page of its complaint herein, after the words "limited copartnership" and before the words "organized and existing," the following words, to wit: "and in effect a corporation."

Second. By inserting in the first line of the prayer in said complaint on page 8, after the word "judgment," the following words, to wit: "against said defendant for the value of said pipe and materials furnished to said Oconto Water Company and for the amount of its said lien against the property of said Oconto Water Company."

Third. By inserting in the twelfth line of said prayer on page eight, after the words "hereinbefore set forth," the following words, to wit: "and that said defendant be ordered and required to pay the amount of said plaintiff's judgment against said Oconto Water Company and against said defendant herein in such manner as to this court shall seem just and pursuant with its equitable powers and in accordance with the practice in such cases."

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

53 (Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Ltd., *vs.* Oconto City Water Supply Co. Motion to amend complaint. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Oconto county, Wis. Filed in office of clerk of circuit court Aug. 22, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

54 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

The plaintiff having duly moved to amend its complaint herein, and said motion coming on to be heard, after hearing Messrs. Miller,

Noyes, Miller & Wahl in support thereof and W. H. Webster and George G. Greene in opposition—

It is ordered that said complaint be amended as follows:

"First. By inserting in the fourth line, after the title on the first page of its complaint herein, after the words 'limited copartnership' and before the words 'organized and existing,' the following words, to wit: 'and in effect a corporation.'

"Second. By inserting in the first line of the prayer in said complaint on page 8, after the word 'judgment,' the following words, to wit: 'against said defendant for the value of said pipe and materials furnished to said Oconto Water Company and for the amount of its said lien against the property of said Oconto Water Company.'

"Third. By inserting in the twelfth line of said prayer on page eight, after the words 'hereinbefore set forth,' the following words, to wit: "and that said defendant be ordered and required to pay the amount of said plaintiff's judgment against said Oconto Water Company and against said defendant herein in such manner as to this court shall seem just and pursuant with its equitable powers and in accordance with the practice in such cases.'"

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

55 (Endorsements:) Original. Circuit court, Oconto county. National Foundry and Pipe Works, Limited, plaintiff, *vs.* Oconto City Water Supply Co., defendant. Order amending complaint. Oconto county, Wis. Filed in office of clerk of circuit court Aug. 22, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

56 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

The plaintiff above named having applied for leave to amend its complaint herein, and after hearing of the parties—

It is hereby ordered that said complaint be, and the same is hereby, amended by inserting after the word "judgment," in the first line of the prayer of said complaint, the following words, to wit, "against said defendant for the value of said pipe and materials furnished to said Oconto Water Company, and for the amount of its said lien against the property of said Oconto Water Company," and by inserting after the words "hereinbefore set forth," in the third line from the end of said prayer, the following words, to wit, "and that said defendant be ordered and required to pay the same."

Dated May, 1898.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

(Endorsements:) 4432. Circuit court, Oconto county. National Foundry and Pipe Works, Limited, *vs.* Oconto City Water Supply Co. Order amending complaint. Miller, Noyes, Miller & Wahl, attorneys, 102 Wisconsin street, Milwaukee. Oconto county, Wis. Filed in office of clerk of circuit court Jan. 21, 1899. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

57 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

On the complaint and answer herein and motion of W. H. Webster, defendant's attorney, let the plaintiff show cause before the court, at the court-house, in the city of Oconto, Wisconsin, on Thursday, the 14th day of April, 1898, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, why the defendant should not have leave to amend its answer herein as proposed in the annexed document denominated "Proposed amendments to answer," and why the defendant should not have such other or further relief as to the court may seem just.

Ordered further that this order, by copy, be served upon plaintiff's attorneys herein on or before April 11, 1898.

H. F. JONES,
County Judge of Oconto County, Wisconsin.

(Endorsement:) Oconto county, Wis. Filed in office of clerk of circuit court Aug. 22, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk supreme court Wis.

58 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Proposed Amendments of Answer.

I.

Add to the first paragraph the following:

"Save that defendant denies that plaintiff is or ever was authorized to acquire or hold property or sue in said partnership name, the defendant insists that plaintiff has no capacity to sue in said partnership name and no power to sue save in the names of the members of said partnership, and that this action should abate."

II.

And following paragraphs:

Seventeenth. Defendant alleges that on or about the 5th day of October, 1896, a judgment was rendered in an action pending in the United States circuit court of appeals for the seventh circuit, wherein the plaintiff in the lien decree mentioned in the complaint

was plaintiff and the defendant in said decree and said S. D. Andrews, W. H. Whitcomb, The City of Oconto, this defendant, and others were defendants, whereby it was adjudged that said lien decree was of no effect against this defendant or said Andrews or Whitcomb; that as to this defendant and said Andrews and Whitcomb and all of the world except the defendant in said decree the plaintiff had and there could be no lien on the premises and property described therein and in said decree; that this defendant and Andrews and Whitcomb purchased, held, and owned said premises and property by claim and title paramount and free and
59 clear of any claim or lien of said plaintiff, and that by the laws and policy of Wisconsin, under which the plaintiff claimed said lien and under which it existed, if at all, there was and could be no lien; that said determination is reported in volume 76 of the Federal Reporter, on pages 166 to 176, and was adhered to by said court in volume 77 of said Reporter, at pages 774 to 778; that thereupon said court issued its mandate therein to the trial court, viz., the United States circuit court for the eastern district of Wisconsin, accordingly, and, upon the same being there received and filed, judgment in accordance therewith was on the 29th day of July, 1897, duly rendered and entered in said court, which judgment has never been appealed from, modified, or altered.

Eighteenth. The defendant further alleges that on or about the 9th day of January, 1892, a judgment was rendered in an action pending in this court wherein The Chapman Valve Manufacturing Company was the nominal plaintiff and the defendant in said lien decree was defendant, whereby it was adjudged that by the laws and policy of this State, by virtue of which only the plaintiff in said lien decree claimed and had a lien, if any existed, there was and could be no lien on said premises and property for supplies, materials, machinery, or labor used in the construction of said water-works plant or for any other purpose; which judgment was duly affirmed by the supreme court of said State on the 30th day of October, 1894; that, as plaintiff is informed and believes, the plaintiff in said lien decree was a party in interest in said last-mentioned action and co-operated with the nominal plaintiff in said action in the commencement, control, trial, and management thereof and in the appeal from the judgment therein.

60 (Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Limited, plaintiff, *vs.* Oconto City Water Supply Co., defendant. Order to show cause, etc. (Original.) Due service, by copy, of the within order is hereby admitted this 8th day of April, 1898. Miller, Noyes, Miller & Wahl, pl'ff's att'ys. Webster & Classon, def't's att'ys. Oconto county, Wis. Filed in office of clerk of circuit court Aug. 22, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

61 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

An order having been duly made herein requiring the plaintiff to show cause why the defendant should not have leave to amend its answer, and said cause having come on to be heard, after hearing W. H. Webster and George G. Greene in support of said motion and Messrs. Miller, Noyes, Miller & Wahl in opposition, it is ordered that said answer be, and the same is hereby, amended by adding to the first paragraph thereof the following:

"Save that defendant denies that plaintiff is or ever was authorized to acquire or hold property or sue in said partnership name, the defendant insists that plaintiff has no capacity to sue in said partnership name and no power to sue save in the names of the members of said partnership, and that this action should abate."

It is further ordered that said answer be, and the same is hereby, amended by adding thereto the following paragraph:

"Seventeenth. Defendant alleges that on or about the 5th day of October, 1896, a judgment was rendered in an action pending in the United States circuit court of appeals for the seventh circuit, wherein the plaintiff in the lien decree mentioned in the complaint was plaintiff and the defendant in said decree, the said S. D. Andrews, W. H. Whitcomb, The City of Oconto, this defendant, and others were defendants, whereby it was adjudged that said lien decree was of no effect against this defendant or said Andrews or Whitcomb; that as to this defendant and said Andrews and Whitcomb and all of the world, except the defendant in said decree, the plaintiff had and there could be no lien on the premises and
62 property described therein and in said decree; that this defendant and Andrews and Whitcomb purchased, held, and owned said premises and property by claim and title paramount and free and clear of any claim or lien of said plaintiff, and that by the laws and policy of Wisconsin, under which the plaintiff claimed said lien and under which it existed, if at all, there was and could be no lien; that said determination is reported in volume 76 of the Federal Reporter, on pages 166 to 176, and was adhered to by said court in volume 77 of said Reporter, at pages 774 to 778; that thereupon said court issued its mandate therein to the trial court, viz., the United States circuit court for the eastern district of Wisconsin, accordingly, and upon the same being there received and filed judgment in accordance therewith was, on the 29th day of July, 1897, duly rendered and entered in said court, which judgment has never been appealed from, modified, or altered."

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

(Endorsements:) Original. Circuit court, Oconto county. National Foundry and Pipe Works, Limited, plaintiff, *vs.* Oconto City Water Supply Company, defendant. Order amending answer.

Oconto county, Wis. Filed in office of clerk of circuit court, Aug. 22, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

63 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Now comes the above-named plaintiff and requests the court to make the following finding of fact:

First. That at and prior to the commencement of said suit by said S. D. Andrews and W. H. Whitcomb in the said circuit court of Oconto county to foreclose their said mortgages or pledges they knew and ever since said time have known that said plaintiff filed its claim for a mechanics' lien against the said pipe and the said water plant, and had commenced proceedings in said circuit court of the United States for the eastern district of Wisconsin for the enforcement of said lien.

Said plaintiff requests the court to make the following conclusion of law:

First. That this action is not barred by virtue of the sixth finding of fact herein.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

The court refuses the requests of the plaintiff to make the above finding of fact and the above conclusion of law.

SAM'L D. HASTINGS, JR., *Judge.*

The plaintiff, by its attorneys, excepts to the ruling of the court refusing to make the above finding of fact, and also to its ruling refusing to make the above conclusion of law.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

64 (Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Limited, pl'ff, *vs.* Oconto City Water Supply Co., def't. Plaintiff's requests for findings. Original. Oconto county, Wis. Filed in office of clerk of circuit court Oct. 31, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

65 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Findings of Fact and Conclusions of Law as Modified.

This cause having been tried before the court without a jury, the court hereby makes its findings of fact and conclusions of law as follows, to wit:

Findings of Fact.

First. That while plaintiff was, at all the times mentioned in the pleadings, and still is nominally a limited partnership, it was at said times and still is really a corporation and the same party for and against whom as the National Foundry and Pipe Works, Limited, the decree and decisions mentioned in the pleadings were made and entered.

Second. That the defendant was organized under chapter 86, pursuant to the authority of section 1788 of the Revised Statutes of Wisconsin, by the purchasers at the sale on the foreclosure of the Andrews and Whitcomb mortgages mentioned in the pleadings, and that on such organization the said purchasers transferred to the defendant corporation the rights, powers, privileges, franchises, and property embraced in said mortgage and sale.

Third. That the plaintiff sold and delivered to the Oconto Water Company iron pipe which was used as in the complaint alleged, and which said iron pipe has not been paid for, and that said plaintiff filed a claim for lien therefor and its bill to foreclose such lien, and that a decree was entered in said suit as in the complaint alleged, and that there was a marshal's sale and deed under said decree as in the complaint alleged.

66 Fourth. That suit was commenced to foreclose the mortgages or pledges of Andrews and Whitcomb, and that judgment was entered in said suit and sale made under said judgment as in the complaint alleged.

Fifth. That said mortgages or pledges of Andrews and Whitcomb, the foreclosure thereof and foreclosure sale thereunder, and the said transfer from the purchasers on such sale to the defendant embraced the water-works plant as well as the franchises named in said mortgages.

Sixth. That on or about the 5th day of October, A. D. 1896, a decision was made in an action theretofore commenced in the circuit court of the United States for the eastern district of Wisconsin and pending on appeal in the United States circuit court of appeals for the seventh circuit, wherein the plaintiff herein was the complainant and one of the appellees and this defendant, together with S. D. Andrews, W. H. Whitcomb, and The City of Oconto, were defendants and appellants, whereby said United States circuit court of appeals for the seventh circuit did reverse the decree rendered by the circuit

court for the eastern district of Wisconsin, and did issue its mandate therein to said circuit court, and, upon the same being there received and filed, a decree in accordance with said mandate was, on the 29th day of July, 1897, entered in said court, which said decree has never been appealed from, modified, or altered; that said decision of said United States circuit court of appeals is reported in volume 76 of the Federal Reporter, on pages 166–176, and the determination of said court on the petition for rehearing therein is reported in volume 77 of said Federal Reporter, at pages 774–778; that in and by said decision and said decree it was decided that the said mechanics' lien decree of said complainant was binding on the said Oconto Water Company, but that it was not binding on this defendant, Oconto City Water Supply Company; that, as to this defendant, complain-
67 ant never had any mechanics' lien; that the issues raised by the pleadings in said Federal court as to the existence and supremacy of such lien against this defendant were the same as in this case, and that the questions therein decided are the same as are involved in this case, and that the questions there decided became by the decree of said court *res adjudicata* between the parties hereto.

Seventh. That on or about the 1st day of December, A. D. 1890, the said S. D. Andrews and W. H. Whitcomb knew and at all times since have known that said plaintiff furnished the pipe used in the construction of said water plant and had not been paid for the balance remaining due for and on account thereof, and that on January 13th, 1891, Andrews and Whitcomb were informed that the plaintiff claimed a lien on said plant for said pipe, and that Andrews and Whitcomb did not then think that the plaintiff had such lien, and relied upon their securities.

Conclusions of Law.

First. That the plaintiff has not and never had any lien on the water-works plant and property on which it claims such lien.

Second. That the defendant holds and owns said plant and property by claim and title paramount and free and clear of any claim or lien of the plaintiff.

Third. That the plaintiff is not entitled to any of the relief demanded in the complaint as amended or otherwise.

Fourth. That the defendant is entitled to judgment on the merits dismissing the complaint and action.

Dated August 30, 1898.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

68 Circuit court, Oconto county. National Foundry and Pipe Works, Ltd., pl'ff, *vs.* Oconto City Water Supply Co., def't. Modified findings of fact and conclusions of law. Original. Oconto county, Wis. Filed in office of clerk of circuit court Oct. 31, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

69 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

And now comes the above-named plaintiff, by Miller, Noyes, Miller & Wahl, its attorneys, and excepts to the second finding of fact and to each and every part thereof.

Said plaintiff also excepts to the fourth finding of fact and to each and every part thereof.

Said plaintiff excepts to the fifth finding of fact and to each and every part thereof.

Said plaintiff excepts to the sixty finding of fact and to each and every part thereof.

Said plaintiff excepts to the following portion of the sixth finding of fact, to wit: "But that it was not binding on this defendant, Oconto City Water Supply Company."

Said plaintiff excepts to the following portion of said sixth finding of fact: "That as to this defendant complainant never had any mechanics' lien."

Said plaintiff excepts to the following portion of said sixth finding of fact, to wit: "That the issues raised by the pleadings in said Federal court as to the existence and supremacy of such lien against this defendant were the same as in this case."

Said plaintiff excepts to the following portion of said sixth finding of fact, to wit, "and that the questions therein decided are the same as are involved in this case."

Said plaintiff excepts to the following portion of said sixth finding of fact, to wit, "and that the questions there decided became by the decree of said court *res adjudicata* between the parties
70 hereto."

Said plaintiff excepts to the following portion of the seventh finding of fact, to wit, "and that Andrews and Whitcomb did not then think that the plaintiff had such a lien, and relied upon their securities."

Said plaintiff excepts to the first conclusion of law and to each and every part thereof.

Said plaintiff excepts to the second conclusion of law and to each and every part thereof.

Said plaintiff excepts to the third conclusion of law and to each and every part thereof.

Said plaintiff excepts to the fourth conclusion of law and to each and every part thereof.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

(Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Ltd., pl'ff, *vs.* Oconto City Water Supply Co., def't. Exception to findings of fact and conclusions of law. Original. Oconto county, Wis. Filed in office of clerk of circuit court Oct. 5—216

31, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

71 Circuit Court for Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
vs.
OCONTO CITY WATER SUPPLY COMPANY.

The plaintiff's first proposition is that a company organized under the provisions of sec. 1788 R. S. by the purchasers of the property and mortgageable franchises of another corporation on foreclosure sale becomes liable for all the debts of the old corporation, whose property, rights, powers, privileges, and franchises it acquired by such sale.

I do not think that counsel is correct in this proposition. The company organized is a new and different company, and not liable for the acts or debts of the old company. Neff *v.* Boom Co., 50 Wis., 585, and other cases cited by defendant's counsel. The new company does not derive its corporate existence from the company whose franchises and property it purchases, but from the statute which authorizes the owners of those franchises and property to organize and be a corporation. If by the purchase the purchaser acquired the franchise to be a corporation, no statute would be necessary to confer upon him the right to become one. "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises." 112 U. S., 609; Book 25 Jg., 841.

Sec. 1748 R. S. only authorizes a corporation to mortgage its franchises, not the franchises of its members. While there are
72 expressions and statements made in opinions not entirely consistent with this proposition, I have found no direct adjudication that is not in harmony with it.

The plaintiff's second proposition is that it (or they) had a valid lien against the property when Andrews and Whitcomb took their mortgage and purchased at their foreclosure sale and sold to the defendant; and while they or it has no remedy at law for enforcing that lien, equity will compel the defendant to pay it or cease using the property. The facts are that under the laws of Wisconsin the plaintiff has no lien. The only claim of lien is under a statute of Wisconsin which gives no lien. Andrews and Whitcomb, with knowledge of the facts out of which the plaintiff claims a lien, took their mortgage in good faith, foreclosed and bid in the property, knowing that the plaintiff had no lien. Afterwards, in an action by the plaintiff against the Oconto Water Co., to which neither Andrews or Whitcomb or the defendant was a party, a Federal court, errone-

ously construing the law of this State, adjudged a lien in plaintiff's favor against the Oconto Water Co. In a later case, by the plaintiff against Andrews and Whitcomb and the defendant, in the same Federal court, the validity of that decree against the Oconto Water Company was in issue, and it was decided that the judgment was binding on the Oconto Water Co., but that it was erroneous and contrary to law and not binding on the defendant. It seems to me that that question is *res judicata* between the parties. It was an issue raised by the pleadings in that case, and on the same evidence as presented in this case directly passed upon by the court and entered into the judgment. Whether *res judicata* or not, the decision of the Federal court on the question seems to me clearly right.

I do not think that the plaintiff shows itself entitled to relief on either theory advanced.

73 The defendant demurred *ore tenus* to the complaint, and thereby attempted to raise the objection that if the plaintiff has any rights on the facts stated his remedy is at law.

That objection cannot be raised in that way. It is waived unless raised by demurrer or answer. Neither 74 Wis., 452, or 74 Wis., 599, were demurrers *ore tenus*. A remark in 83 Wis., 616, which tends to support defendant's position is overruled in 74 N. W. R., 974, 976, and the question is decided in 72 Wis., 339; 80 Wis., 484; 86 Wis., 125, 136; 92 Wis., 571.

The amendments asked for by both plaintiff and defendant will be allowed.

I find that the plaintiff is a corporation, with full power to sue and be sued as such. This fully appears from the laws under which it has its existence.

I do not recall any question of fact on which there is a conflict of testimony. Counsel can probably agree on findings. If not, each can present such as they think they are entitled to.

SAM'L D. HASTINGS, JR., *Judge.*

May 30, 1898.

(Endorsements:) Circuit court for Oconto county. National Foundry and Pipe Works, Limited, *vs.* Oconto City Water Supply Company. Decision. Oconto county, Wis. Filed in office of clerk of circuit court Aug. 22, 1898. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk supreme court Wis.

74 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
vs.
OCONTO CITY WATER SUPPLY CO.

After considering plaintiff's application to have findings and judgment modified my conclusion is:

(1.) That the testimony does not support the proposed 7th finding as drawn. Strike out all of said proposed finding commencing with the words "at and prior to the commencement of" and insert in lieu thereof "on Jan'y 13, 1891, Andrews and Whitcomb were

informed that the plaintiff claimed a lien on said plant for such pipe, and that Andrews and Whitcomb did not then think that the plaintiff had such lien and relied upon their securities." With the 7th finding so modified the proposed findings of fact may be substituted for those signed and filed.

(2.) The conclusions of law and judgment assigned are not broader than the issues and proofs and properly express what the court decides and intended to decide. The plaintiff never had any lien. Such is the settled law of this State, and the judgment in the case in the Federal court is proof conclusive on the question.

Neither the conclusions of law nor the judgment will be modified.

SAM'L D. HASTINGS, JR., *Judge.*

(Endorsements:) 4432. Circuit court for Oconto county. National Foundry and Pipe Works, Limited, *vs.* Oconto City Water Supply Co. Decision on application to amend findings. Oconto county, Wis. Filed in office of clerk of circuit court Mar. 7, 1899. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

75 STATE OF WISCONSIN:

Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

The above-entitled action having been tried by the court, and the court having duly made and filed its findings of fact and conclusions of law—

It is adjudged that the plaintiff has not and never had any lien on the water-works plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and title paramount to and free and clear of any claim or lien of the plaintiff; that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise.

It is further adjudged that this action be, and the same is hereby, dismissed for want of equity, and that the defendant do have and recover of and from the plaintiff the sum of sixty-three and $\frac{92}{100}$ dollars, its costs and disbursements in this action.

Dated August 20th, 1898.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

(Endorsements:) 4432, original. Circuit court, Oconto county. National Foundry and Pipe Works, Limited, plaintiff, *vs.* Oconto City Water Supply Co., defendant. Judgment recorded. W. H. Webster, attorney for defendant, Green Bay, Wis. Oconto county, Wis. Filed in office of clerk of circuit court Aug. 22, 1898, 9 a. m. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

76 Circuit Court, Milwaukee County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Please take notice that the within is the bill of exceptions proposed on behalf of the plaintiff in the above-entitled action.

Yours, etc.,

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

To W. H. Webster, Esq., attorney for defendant.

77 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Be it remembered that on the — day of May, A. D. 1898, the above-entitled cause came on for trial before the court without a jury, Messrs. Miller, Noyes, Miller & Wahl appearing on behalf of the plaintiff and Messrs. W. H. Webster and George G. Greene appearing on behalf of said defendant; whereupon the following proceedings took place:

The plaintiff, to maintain its action, introduced the following evidence:

Statement Showing Dates of Delivery of Material at Oconto to Oconto Water Company.

Date.	Number of pieces.	Weight.
Sept. 8, 1890	110	42,300
" 8, "	128	49,000
" 8, "	50	35,800
" 11, "	138	54,000
" 11, "	78	31,200
" 11, "	100	39,100
" 11, "	48	35,000
" 11, "	68	37,400
" 11, "	111	44,600
" 15, "	84	32,400
" 16, "	42	43,000
" 17, "	110	42,500
" 18, "	107	41,800
Sept. 18, 1890	84	32,500
78 " 18, "	55	40,500
" 19, "	42	45,800
Sept. 19, 1890	93	37,200
" 20, "	112	43,000
" 23, "	40	41,500
" 23, "	44	42,700

Sept. 26, 1890	106		42,000
" 28, "	56		43,800
Oct. 1, "	44		42,600
" 1, "	30		40,000
" 2, "	126		41,300
" 2, "	38		37,000
" 2, "	50		39,800
" 3, "	21	Miscellaneous	
" 15, "	91		39,000
" 16, "	72		29,800
" 16, "	105		45,700
" 20, "	105		45,600
" 20, "	116		51,000
" 23, "	142		56,000
" 24, "	109		38,000
" 27, "	112		49,000
" 28, "	103		45,000
" 28, "	113		50,300
" 31, "	137		58,900
Nov. 3, "	79		42,000
" 8, "	84		44,200
" 8, "	85		45,000
" 12, "	60		32,000
Nov. 17, 1890	75		34,400
79 " 17, "	116		50,200
" 20, "	70		38,500
Nov. 20, 1890	79		43,400
" 24, "	86		44,400

It was admitted by the parties, first, that the debt of the plaintiff for which it recovered its judgment mentioned in the complaint was for iron pipe furnished for and used in the construction of the water-works plant under a contract therefor dated August 28, 1890, whereby the complainant agreed to deliver, in Oconto, pipe as follows:

22,275 feet six-inch pipe, 32 pounds per foot, and 15,400 feet eight-inch pipe, 45 pounds per foot, at $29.80 per two thousand pounds.

3,027 feet ten-inch pipe, 66 pounds per foot, and 3,700 feet 12-inch pipe, 83 pounds per foot, at $29.30 per two thousand pounds.

The terms of payment for which pipe were to be one-third cash thirty days from date of delivery at Oconto; balance four months from same date as cash payment, at 6 per cent. interest.

Second. The pipe was delivered during the months of September, October, and November, the total price therefor being the sum of twenty-nine thousand seven hundred forty-one and $\frac{56}{100}$ ($29,741.56). There was paid upon the same in cash the sum of two thousand dollars on or about October 29, 1890, and twenty and $\frac{18}{100}$ dollars ($20.18) on or about November 28, 1890, and the sum of five thousand two hundred and thirty-seven and $\frac{97}{100}$ dollars ($5,237.97) paid by way of freight charges November 29, 1890, the balance of the

purchase price being, with interest, the sum for which judgment was obtained.

Third. The Oconto Water Company executed and delivered to the complainant two notes, dated October 1, 1890, for five thou-
80 sand dollars each, payable in four months from such date, with interest, at six per cent. per annum, from November 1, 1890.

Affidavit of W. H. Webster, dated July 16, 1894. Said affidavit was used on a motion in the action appealed to the United States circuit court of appeals mentioned in the 17th subdivision of the answer herein as amended, and was in the record and printed transcript on such appeal.

I have had exclusive charge of this litigation from its commencement until the present time for the defendants, Oconto Water Company, S. D. Andrews, W. H. Whitcomb, and Oconto City Water Supply Company, and am personally familiar with every act, fact, matter, or thing that has taken place on the part of either of said defendants during that time, relating in any way to the property and franchises affected by this action.

I had charge of the matter of the incorporation of the defendant Oconto City Water Supply Company, drew the papers and attended to all the details thereof, as the agent or attorney for the defendants S. D. Andrews and W. H. Whitcomb. That said defendant Oconto City Water Supply Company was not incorporated until the 7th day of July, 1892, on which day its articles of incorporation were filed in the office of the register of deeds in and for Oconto county, Wisconsin, the county in which said company has its corporate location.

That after the defendants S. E. Andrews and W. H. Whitcomb became the owners of the property affectedby this action, as set forth in their answer herein, they caused said defendant, Oconto City Water Supply Company, on the 7th day of July, 1892, as aforesaid, to be incorporated, as authorized by section 1788 of the Revised Statutes of Wisconsin of 1878 and the acts amendatory thereof.

That after causing said company to be incorporated, as aforesaid, and on or about the 25th day of July, 1892, the said S. D. Andrews and W. H. Whitcomb transferred to said company all of their
81 interest in the property affected by this action, together with the rents, issues, and profits, or any part thereof, that had been earned up to that time, but said defendants, S. D. Andrews and W. H. Whitcomb, were at the time of such transfer and have always been the sole owners of all of the stock and, in consequence, of all of the property of said Oconto City Water Supply Company.

That at the time of the incorporation of said company, as aforesaid, the said S. D. Andrews and W. H. Whitcomb were in possession of all of the property affected by this action, except the unpaid sums due them for water furnished by them to the city of Oconto and to private consumers after they came into possession of the water plant affected by this action, and after the incorporation of said Oconto City Water Supply Company, as aforesaid, the said S. D. Andrews and W. H. Whitcomb, although they had transferred their title to said property to said defendant, Oconto City Water Supply

Company, continued the same possession and use of said property as they had of the same prior to such transfer, and such possession and use thereof did not change until all of such property as had come into the possession of said Andrews & Whitcomb was turned over to the receiver under the order of this court appointing such receiver.

82 *Testimony of S. D. Andrews.*

Q. What salary have you been receiving from the Oconto Water Company, Mr. Andrews, if any?

A. $100 a month.

Q. Since when?

A. Since I commenced here last October, when I have been here.

Q. Do the books of account show how much has been paid you by the Oconto Water Company for your services?

A. Yes, sir.

Q. Please state how much.

A. I received for my services from October 15th or 16th, when I came up here. up to the 20th of January, from the old company—that is, the salary amounted to $300.

Q. Your salary as what? What position?

A. I had charge of looking after the pipe-laying at that time.

Q. Laying of the pipe received from the plaintiff in this suit?

A. Yes.

Said testimony was part of that taken in said appealed action and was in the record and printed transcript on such appeal.

Affidavit of George W. Sturdevant, Jr.

That upon coming to the agreement for the loan above mentioned, which the said Garland, Todd, and Andrews arrived at on that occasion, a memorandum thereof was, at the request of said parties, drawn by this affiant and signed by said parties and left in the bank at Menasha for their joint use until more formal instruments evidencing the arrangement could subsequently be drawn and signed; that the object of executing said memorandum and depositing the same, as aforesaid, on that occasion was to enable the said Garland and Todd,

83 as such officers of said defendant, Oconto Water Company, to obtain from the defendants Andrews and Whitcomb that night the first advance of said loan, and upon such memorandum being signed and deposited, as aforesaid, the said S. D. Andrews, for the defendants Andrews and Whitcomb, made the first advance of $5,000 of said loan to said Garland and Todd for said Oconto Water Company, which, it was distinctly understood by all the parties there present on that occasion, was needed by said Garland and Todd to enable them to pay the freight upon a large quantity of pipe subsequently worked into the defendant Oconto Water Company's pipe line, which was then lying on board the cars at Oconto, waiting payment of the freight thereon before delivery to said Oconto Water Company.

Deposition of George W. Sturtevant, Jr.

Q. Did you ever see or have in your possession what purported to be an assignment of the stock, franchise, and bonds of the company of date September 13, 1890?

A. Do you mean the memorandum of contract made on that day at Menasha?

Judge NOYES: Yes, sir; what purported to be an assignment of the contract by Andrews and Whitcomb.

A. I do not think I ever have seen it.

Q. What was the arrangement with respect to obtaining the signatures to duplicate contracts to be copied or written by Mr. Todd—that is, the signatures of the parties?

A. You ask what was the arrangement; my recollection is that the duplicate contracts or copies were to be drawn by Mr. Todd, and forwarded for the signature and seal of the company, and then for the signature of Andrews and Whitcomb, one copy to be returned to the water company or Garland and Todd.

Q. Mr. Whitcomb was then in Maine?

A. Yes, sir.

Q. Where did Mr. Andrews go after September 13?

84 A. I think he went to Maine.

Q. And the papers were to be sent down to Maine for execution by Andrews and Whitcomb?

A. Yes, sir.

Testimony of S. D. Andrews.

Q. Did you come to an arrangement with him to do that work for the company?

A. With him and Mr. Todd.

Q. Can you state when you commenced work in that employment?

A. Within a few days after I reached Oconto; I cannot give the date.

Q. How long did you continue?

A. I think we finished laying pipes in the streets December 12, 1890; that is my impression.

Q. That is when your employment ceased?

A. Yes, sir; I think so.

Q. In the mean time, after taking that employment, what efforts did you make to obtain the information which you went there to obtain, as you have testified to?

A. I made efforts to see the books or have them in some way inform me what was being done with the funds.

Q. What did you accomplish?

A. Nothing.

Q. You may state whether the books were at any time turned over to you, or any part of them.

A. They were not.

Q. Were you allowed to investigate or examine them?

A. No, sir.

Q. Did anything in the meantime come to your notice or knowledge that the company was not paying for the material which it was putting into that plant?

85 A. Yes, sir.

Q. What was it?

A. Mr. Overholt came there.

Q. Can you state about when?

A. Some time in December, just before we closed the setting of the hydrants. I remember we were on Jones street setting hydrants when he was there; it was along the first part of December. He told me about what they had been paid.

Q. Was that the first knowledge you had that they were not paying for their material?

A. Yes, sir.

Cross-examination:

Q. What time did you leave Menasha after the meeting of September 13, 1890?

A. I left on Monday; I could not give you the time.

Q. Did you go with Mr. Todd to deposit in escrow the memorandum for an agreement which was signed on September 13th at the bank?

A. Yes, sir; that was done on the 15th—Monday, the 15th. I will not say that it was at the bank; I think it was in his law office; I can't be certain about that. It was Monday, the 15th.

Q. What was said to Mr. Silas Bullard at the time that you and Mr. Todd deposited with him the memorandnm signed?

A. It was said that it was deposited in the interest of both parties, and should not be taken away until both parties called for it, or words to that effect.

Q. Was that the agreement which was made when the paper was signed?

A. I think it was.

Q. And was it agreed that the paper should be so deposited with the bank or Bullard, one of its officers, on the following Monday?

86 A. That is my recollection.

Q. Is your recollection the same as Mr. Sturtevant—that it was signed late in the evening, something like 10 o'clock in the evening—Saturday night?

A. Yes, sir.

Q. Why was the agreement made to have the memorandum so deposited?

A. As I understand it, it was so made that we would have time to get the duplicate signed and in this way save copying.

Q. You were not willing to advance money to the Oconto Water Company until this memorandum was signed and deposited?

A. We did practically advance the money that night.

Q. Was not whatever you did toward advancing money done upon the agreement that this memorandum should be deposited on Monday at the bank?

A. I do not remember as that was one of the conditions.

Q. It was part of the agreement, was it not, that the memorandum should be deposited on Monday?

A. I think it was agreed that it should be deposited on Monday.

Q. Why was the note which you have produced, which you say was signed that evening, dated on the 15th of September?

A. Because they could receive no money until Monday.

Q. It was understood, then, that they were not to draw on you until Monday?

A. Yes, sir.

Q. But was it the understanding that they were to draw a draft on you or on Andrews and Whitcomb, at Norway, Maine, on Monday?

A. On Andrews and Whitcomb, I think.

Q. Have you that draft?

A. I have not.

Q. Do you know where it is?

A. No, sir.

87 Q. Have you made any search for it?

A. No, sir.

Q. What was done with the draft when it was paid at Norway, Maine?

A. I think it was taken up.

Q. Have not you or the firm of Andrews & Whitcomb that draft in your possession at Norway, Maine?

A. No, sir, I have not; I could not say as to Whitcomb.

Q. Will you make a search among the papers of Andrews & Whitcomb to find that draft, and, if you can find it, forward it to the officer, to be attached as a part of your deposition?

A. I will make a search, but my papers were most all burned at the time my house burned last May. If I find it I will do it.

Q. What day was that draft paid by Andrews & Whitcomb?

A. I can't tell you.

Q. State as near as you can recollect it.

A. I have no recollection about it.

Q. If the draft was drawn at Oconto on September 15th and forwarded by due course of mail to Norway, Maine, for acceptance and payment, when, in the ordinary course of mail, would it have been received and accepted?

A. It was to be made a sight draft and would be paid on sight.

Q. What date?

A. It would take two days for the mail to reach Norway.

Q. That would be September 17th. Do you know whether that was forwarded through the bank at Oconto?

A. I do not; I expect it was.

Q. What was said, if anything, at the meeting of September 13th, with reference to the preparing of an assignment in writing of the franchise, stock, and bonds?

A. It was agreed that Mr. Garland and Mr. Todd should
88 make a transfer of the franchise to Andrews and Whitcomb.

Q. When did you receive the instrument in writing offered in evidence purporting to be such an assignment?

A. I do not remember what time.

Q. Where did you receive it?

A. I never saw it until I saw it in Oconto about the first of January or last of December.

Q. Do you know where it was kept?

A. It was kept at the Norway national bank.

Q. Why?

A. That is where we kept all of our papers.

Q. Was it not sent by Mr. Garland to you or Mr. Whitcomb?

A. I do not remember.

Q. You do not remember of receiving it?

A. I do not remember of ever seeing it until it was brought or sent to Oconto, in the last of December or first of January.

Q. Your recollection is that it was received by Mr. Whitcomb?

A. By Mr. Whitcomb or the bank.

Q. Did you give instructions to either Garland or Todd to forward that assignment to the bank?

A. I do not remember about the instructions.

Q. You do not recollect what instructions were given with reference to the delivery of the assignment?

A. It was to be sent to Norway, but to whom I could not say.

Q. When did you first become suspicious that the money which you were advancing under the contract was not being used to pay for the pipe that was being delivered and the other materials that were being furnished for the plant?

A. The first to my knowledge that it was not being paid was when Mr. Overholt came to Oconto in December.

Q. Have you not testified that you became so suspicious
89 with respect to the use of the money which was being furnished that you went out there to Oconto and arrived there about the 15th of October?

A. Yes, sir.

Q. Now, then, when did you first become suspicious so as to induce your subsequent trip to Oconto?

A. About the middle of October.

Q. Just prior to your going to Oconto?

A. Yes, sir.

Q. And when you reached Oconto your suspicions were increased from the fact that you were not allowed to see the books of the company nor get any information as to how the money was being used?

A. Yes, sir.

Q. Was it part of the arrangement which you made on September 13th that the money which you were to advance was to be used, so far as needed, in the payment of pipe that had been purchased for the plant?

A. Nothing was said about pipe particularly. It was to be used in the construction of the plant.

Q. Which included payment for materials for the construction of the plant?

A. That would naturally be inferred.

Q. You were also disappointed in the fact that the money which you had advanced had not been used in the payment of the cost of construction of the plant, as had been agreed?

A. I suppose that the most of it was used in the construction of the plant.

Q. But you were disappointed that it had not been used economically or judiciously so that it would have paid more of the cost of the construction of the plant?

A. Yes, sir.

90 Q. You expected, did you not, that it would be used, among other ways, for the payment for pipe which had been contracted for?

A. Yes, sir.

Q. Mr. Andrews, you testified that the papers of Andrews and Whitcomb were kept at Norway, Maine, in a bank of which you were one of the directors?

A. Yes; that is true.

Q. Do you remember when the duplicate contract dated September 13, 1890, was received by you for signature at Norway, Maine?

A. No; I am unable to say the date when it was received.

Q. State as near as you can.

A. Well, I have no means of giving anything distinct as to date; I did not charge my memory with it and have no means of refreshing it.

Q. You would say it was some time after date of the contract?

A. It must have been.

Q. Do you recollect what you did on receipt of those duplicate contracts?

A. No; I do not; they may have been returned.

Q. Did you sign them?

A. I think I did, no doubt.

Q. Did you keep them on deposit in your bank or did you send them to the West?

A. Well, if one was retained it was put into the bank, as we put all the papers in there for safe keeping—that is, against fire or loss.

Q. Do you recollect about that?

A. I recollect the papers were all put there.

Q. Do you recollect whether you kept one of the duplicate contracts or both of them?

A. I should not naturally suppose that I kept both of them.

91 Q. You are stating now a theory; I am asking you for your recollection.

A. I do not think we kept both of them.

Q. Do you recollect whether you returned them both, and to whom?

A. I am unable to say.

Q. Do you recollect of sending either of them for record at Oconto?
A. I do not.
Q. Do you recollect of giving instructions after their receipt to anybody to recall them or file them?
A. I do not recollect any instructions.
Q. Do you recollect when the instrument called an assignment of the stock, bonds, and franchises, which has been offered in evidence, was received by Andrews and Whitcomb?
A. I can't say.
Q. Where was it kept by Andrews & Whitcomb?
A. My impression is that it was sent directly to the bank.
Q. Under whose instructions?
A. It must have been under Mr. Andrews' instructions, if it was so sent.
Q. Do you know whether or not it was so sent?
A. I am quite confident it was, because I was away a great deal of the time, and things were sent there for that reason.
Q. When did you first see that instrument?
A. I do not recollect having seen it until I called for it with the other papers that were left at the bank prior to going to Oconto in January.
Q. Did you take that instrument with you?
A. I think I did.
Q. Did you take the duplicate contract?
92 A. I think I had all the papers that were there.
Q. Do you recollect those two papers?
A. I recollect the assignment, and I am very confident—in fact, all the papers that pertained to the matter were with us there.
Q. Did it result in a meeting of the creditors in Chicago?
A. I think it did.
Q. Can you say about what the date of that meeting was?
A. Some time about the middle or latter part of January.
Q. How soon after the reorganization of the company when Mr. Sturtevant was elected president?
A. Immediately after.
Q. At the time Mr. Sturtevant was elected president and took the assignment from Garland, which has been offered in evidence, you did not transfer to him or deliver to him these certificates of stock which you held, did you?
A. Deliver to whom?
Q. To Mr. Sturtevant.
A. Well, no. We did not deliver it to Mr. Sturtevant. We did not deliver up our securities.
Q. Didn't you know or were not you told, January 13, 1891, that the National Foundry people had a lien upon the property?
A. Well, that question came up, I know. I suppose that they said they had. We didn't think they had.
Q. Didn't they say they were practically safe with that lien?
A. Well, that was a question that was not decided.
Q. Didn't they say so?
A. I don't know that they said so. Still, Mr. Miller made a

statement as to how he considered the situation, the relationship etc.

Q. Can you tell what he said?

A. I can't.

93 Q. Didn't he say that so far as the National Foundry people were concerned they had a lien upon the plant or pipes which they had put in there which would protect them in any event?

A. Well, he may have said it.

Q. Well, was that not what he did say?

A. Well, I suppose that he did, while I don't recollect the exact language used in relation to the situation. Of course we relied upon our securities.

Deposition of E. G. Mullen.

Ten men were employed and time given them at one dollar and a half per day, and seven teamsters were employed at three dollars per day during part of the week ending September 20th, beginning one-half day on September 16th, with one H. Hengesh, a laborer, and John Riley, a teamster. Hengesh began work on the 16th and worked one-half a day, also a full day on the 18th, 19th, and 20th; that John Riley, a teamster, began work on the 16th and worked one-half a day, 17th a day, 18th a day, 19th a day, and 20th a day; that Alfred Trapanna, Fred Wishenburg, Elmer Cole, Tom Bussons, and Theodore Roals, laborers, worked on the same day as the above-mentioned H. Hengesh, and that W. Porter and Joseph Welsh worked four days in the week above mentioned, beginning with one-half day on the 16th; that D. Milberry worked four and one-half days, beginning with one-half day on the 16th, one day 17th, one day 18th, one day 19th, and one day 20th; that checks were issued to all the men whose time is given in the book marked Exhibit A under date of the week ending September 20th, for the amounts shown on the time book so marked opposite their names, being checks numbered 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23, and 24; that the total amount of this pay-roll as shown by the time book is $129.75; that the total of the checks issued to these men amount to $129.75; that an entry on page 6 of the journal

94 marked E 1, J. T. B., Rep., under date of September 24th, charged to the distribution of pipe, shows the amount corresponding with the total as shown by the book and the checks to be $129.75; that on page 9 of the ledger marked Exhibit E E, under the head of distribution of pipe, there is charged under date of September 24th, $129.75; that pipe record book No. 1, marked Exhibit C, is a record under date of September 16, 1890, of car No. 17367, showing the weights of the separate pieces of pipe unloaded from that car September 16th under date of September 16, 1890.

Q. What is shown by Exhibit D?

A. Exhibit D purports to be the record of when they began laying pipe and the sizes and number of specials.

Q. What are the words in this Exhibit D on the first page—tee, Main and Superior?

A. The meaning of that 8-inch T is, that is the special T-shaped casting used in laying main.

Q. And the words Main and Superior, do they refer to certain streets in the city of Oconto?

A. Yes, sir.

Q. And do you know of your own knowledge that the pipes of the Oconto Water Company were laid in those streets?

A. Yes, sir.

Q. Mr. Mullen, are you a book-keeper?

A. Yes, sir.

Q. Are you familiar with the method of keeping books?

A. Yes, sir.

Q. And you have had considerable experience in keeping and examining books, have you?

A. Yes, sir.

Q. And you have given the books of account and other vouchers and memorandum books of the Oconto Water Company in the possession of the receiver, including those produced by you here, a thorough examination?

95 A. Yes, sir.

Q. Is your testimony which you have given based upon such examination and your experience as a book-keeper?

A. Yes, sir.

Q. What is the account in these books in which the item you have referred to is charged, called distribution of pipe?

A. It is the unloading and distributing on the streets of the pipe to be used in laying mains.

Q. State whether you saw this pipe so distributed in the streets of the city of Oconto at the time of its distribution by the Oconto Water Company.

A. Yes, sir; I saw pipe at different times distributed on the streets.

Q. Where on the street was this pipe placed?

A. It was placed along the walk—strung out.

Q. So it was open and visible to the public?

A. Yes, sir.

Q. And was the pipe which you saw distributed the pipe usually used in laying water mains for water companies?

A. Yes, sir.

Q. Do you know whether it was the pipe furnished to the Oconto Water Company by the complainant in this suit?

A. I couldn't say that.

Q. Do you remember of seeing any of this pipe distributed on the pumping-station lot or connected therewith purchased by the Oconto Water Company from the city of Oconto?

A. I saw pipe on the streets adjoining the lot—Chicago street and State street.

Q. This pipe was distributed in those streets which were subse-

quently used by the Oconto Water Company in laying the mains of the water plant?

96 A. Yes, sir.

Q. Will you examine the books of account, Exhibit- E 1 and E E, and state, as appears from the books, when the first money was received by the Oconto Water Company?

A. Under date of September 16th.

Q. Does that show from whom the money was received?

A. It is credited to C. C. Garland.

Q. How much?

A. $2,500.

Q. What was done with the money, as appears from the books?

A. It appears to have been deposited with the Oconto national bank on the same day, September 16th.

Q. What was the first money, as appears from the books, that was paid out from the money so deposited?

A. An item of $50, under date of September 16th.

Q. To whom?

A. F. H. Todd.

Q. He was the secretary of the Oconto Water Company?

A. I presume so; yes, sir.

Draft of Andrews & Whitcomb.

$2,500. OCONTO, WIS., *Sept.* 16, 1890.

On demand pay to the order of the Oconto national bank twenty-five hundred dollars at ——, value received, and charge the same to the account of—

OCONTO WATER CO.,
Per F. H. TODD, *Sec'y & Treas.*

To S. D. Andrews and W. H. Whitcomb, Norway, Maine.

97 Endorsed as follows: Pay H. D. Smith, cashier, or order, for collection to account of Oconto national bank. Wm. K. Smith, cashier.

Across the face: Norway national bank, Norway, Me. Paid.

Statement of W. H. Webster, Attorney for Defendants Andrews & Whitcomb and Oconto Water Company, Relative to the Taxes of the City of Oconto.

In re the petition of Albert E. Smith, receiver, etc., for instructions as to the payment of the taxes claimed by the city of Oconto to be due from the defendant Oconto Water Company for the year 1892, the defendants Oconto Water Company, S. D. Andrews, and W. H. Whitcomb allege, as reasons why such so-called taxes should not be paid, the following:

First. That the defendant The City of Oconto, by its assessors and board of review, assessed the defendant Oconto Water Company for personal property in 1892 at a valuation of $50,000.

Second. That in making such assessment the only entries that were made upon the assessment-roll with reference thereto were as shown by Exhibit A hereto annexed, which is here referred to and made a part of this answer and is a fac-simile copy of the only assessment made by the defendant Oconto Water Company for taxes that year.

Third. That the defendant Oconto Water Company had no personal property liable to assessment in the city of Oconto for 1892.

Fourth. That the property for which the defendant Oconto Water Company was assessed for taxes in said city for 1892, as aforesaid, was the water-works plant constructed by it in said city, as stated in the answer of the defendants Andrews and Whitcomb, filed to the bill of complaint herein (which is here referred to and made a part hereof), consisting of its pipe line, hydrants, and valves laid and constructed under and in the streets of the city of Oconto
98 and connected with its pumping station, composed of steam boilers, pumps, valves and their connections, and a well or reservoir about thirty-three feet deep and thirty-nine feet in diameter, bricked up in circular form from rock foundation, and a brick building enclosing the same, except said well or reservoir, said pumping station and well or reservoir being situated upon the following-described tract of land, situated in the city and county of Oconto, Wisconsin, to wit, a piece of land being part of lot 5, section 19, township 28 north of range 22 east, commencing at the southwest corner of the Denny lot on the east line of State street, thence running south along the east line of State street 127 feet to the north line of Chicago street extended; thence east 12 rods to the Shufeldt lot; thence north along the west line of the Shufeldt lot 22 rods; thence west 4 rods; thence south 16 rods; thence west 8 rods to the place of beginning, the legal title to which lot was at all times during the year 1892 in the defendant City of Oconto. The defendant Oconto Water Company constructed its pumping station upon said lot by reason of the following circumstances, to wit: On the 27th day of May, 1890, the said city of Oconto advertised in the official paper of said city for sealed proposals for the construction of a system of water works for the city of Oconto, stating in such advertisement, among other things, that "the city will furnish suitable ground for the pumping works." Subsequently a bid was accepted by said city for the construction of a system of water works therein, and the defendant Oconto Water Company was subsequently incorporated for the purpose of constructing, operating, and maintaining such system of water works therein, and the said city of Oconto thereafter and on the 9th day of July, 1890, by its ordinance No. 153, granted said defendant, Oconto Water Company, the right to dig up the streets of said city and lay its pipe line therein, and to maintain and use the
99 same for the purpose of operating its said system of water works therein for the period of thirty years.

Fifth. That said city required the pumping station of said water-works system to be constructed upon the tract, piece, or parcel of land hereinbefore described, which the city then owned, and the

said company, for the purpose of constructing its pumping station thereon, entered into possession of said lot with the knowledge and consent of said city and there constructed its said pumping station and well or reservoir, and, when completed, enclosed the same in the brick building above referred to, which now remains thereon.

Sixth. That at or about the same time the said Oconto Water Company took possession of said lot, as aforesaid, for the purpose of constructing its pumping station thereon the said company and city agreed by parol that said company could at any time thereafter, when it should pay the city the sum of $1,050 therefor, become the owner of said lot, and that the city would then convey the same to said company, and said company at all times in constructing its said pumping station upon said land and in making such use of said land, as it has since taken possession thereof, did so at all times with the knowledge and consent of the city and under and in accordance with and under said parol agreement between the city and itself that the city would convey such land to said water company when said water company should pay the price above mentioned therefor; that thereafter and on the 6th day of January, 1891, the common council of said city duly adopted the following motion with reference thereto, as follows: "Moved that the mayor and clerk be authorized to enter into a land contract with the Oconto Water Company for the sale of land upon which their plant is being erected;" which action of the council was duly recorded and kept upon the record of the proceedings of said council, as required by the charter of said city.

100 Seventh. That subsequently and on or about the 1st day of February, 1891, the common council of said city adopted a motion unconditionally rescinding said resolution of January 6, 1891, which action of the council was duly recorded and kept as required by the charter of said city.

Eighth. That no proceedings have ever been had at law or in equity on the part of either said city to bar the said company from any interest it may have so acquired in said lot or on the part of said company to compel performance by said city of its parol contract for the conveyance of said land, but said company, its successors or assigns, have repeatedly tendered performance of said contract on their part and are now ready and willing to so perform, but the city has always refused and now refuses performance on its part.

Ninth. That by reason of the acts, facts, matters, and things set forth in their answer filed to the bill of complaint herein the defendants Andrews and Whitcomb claim to have become on the 12th day of September, 1891, the owners of said water-works plant and of all of the interest acquired by said water company in the lot or tract of land holding its pumping station, and hereinbefore described, by reason of the facts hereinbefore set forth, and that they or their grantees, namely, the Oconto City Water Supply Company, referred to in the bill of complaint herein, have ever since remained the owners thereof, and that the property and all of the same for which the defendant Oconto Water Company was so, as aforesaid, assessed for taxes by the taxing officers of the city of Oconto for 1892 was at all

times during the year 1892 their and not the property of the defendant The Oconto Water Company, and that the question as to whether the defendant Oconto Water Company's title to all of said property was not divested before the year 1892 and vested in the de-
101 fendants Andrews and Whitcomb is one of the questions now being litigated in this case.

February 23, 1893.

102 *Answer in said Action Appealed to the U. S. Circuit Court of Appeals.*

UNITED STATES OF AMERICA:

In the Circuit Court for the Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS (LIMITED), Complainant,
v.
OCONTO WATER COMPANY, CHARLES C. GARLAND, S. D. ANDREWS, W. H. Whitcomb, F. H. Todd, George W. Sturtevant, Jr., S. W. Ford, Minneapolis Trust Company, Oconto National Bank, City of Oconto, Matt. S. Wheeler, A. J. Elkins, N. S. Todd, and Oconto City Water Supply Company, Defendants.

The joint answer of S. D. Andrews and W. H. Whitcomb, two of the defendants, to the bill of complaint of National Foundry and Pipe Works (Limited), complainant.

These defendants now and at all times hereafter saving and reserving to themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, they, these defendants, jointly answering say:

First. They admit the corporate character, organization, existence, citizenship and residence of the complainant, the de-
103 fendants, Oconto Water Company, Minneapolis Trust Company, Oconto National Bank and City of Oconto, and the citizenship and residence of the defendants, Charles C. Garland, S. D. Andrews, W. H. Whitcomb, F. H. Todd, Geo. W. Sturtevant, Jr., S. W. Ford, Matt. S. Wheeler, A. J. Elkins and N. S. Todd, all as stated in said bill of complaint.

Second. They deny that the defendant, Oconto City Water Supply Company, is or ever was a corporation or that it is or ever was a resident or citizen of Wisconsin.

Third. They admit the recovery of judgment by the complainant against the defendant Oconto Water Company, the docketing thereof, the issuing and return of execution thereon, all as stated in said bill of complaint and that said judgment remains wholly unpaid, unsatisfied and unreversed.

Fourth. They admit that the defendant Oconto Water Company is indebted to various persons and that it is unable to pay its debts, including the complainant's said judgment, and that it is wholly insolvent.

Fifth. They admit that this action was not commenced and is not prosecuted in collusion with any of the defendants and that the object of its commencement and prosecution is as stated in said bill of complaint.

Sixth. They deny that the defendant, Oconto Water Company, has or, except as hereinafter stated, ever had any equitable interest or interests or chose or choses in action or property of any kind.

Seventh. They deny that there is now or, except as hereinafter stated, that there ever was held in trust, secret or otherwise, or under colorable title, by any person or persons, for or for the benefit of the defendant, Oconto Water Company, any real or personal estate or property or any franchise or right or chattel real or thing in action or evidence of debt or any kind of property whatever, and they deny that said defendant, Oconto Water Company has or, except as hereinafter stated, ever had in its possession, power or custody or under its control or direction any property or right of any kind, and they deny that said defendant, Oconto Water Company, ever had any property of any kind or any interest in or trust concerning or power over or agreement affecting any property of any kind which it refuses or ever refused to disclose to the complainant or which it had not prior to the commencement of this action fully and fairly disclosed to the complainant.

Eighth. They admit that said defendant, Oconto Water Company, filed and recorded its articles of incorporation pursuant to
104 the provisions of the Revised Statutes of Wisconsin on the 8th day of January, A. D. 1890, and they allege that F. B. Barnes, J. W. McCabe and W. E. Krippene, named in the bill of complaint herein, were the sole incorporators thereof.

Ninth. They admit that the capital stock of said defendant, Oconto Water Company, was one hundred thousand dollars, consisting of one thousand shares of one hundred dollars each, and that its officers were a board of three directors and a president, secretary and treasurer.

Tenth. They admit that after the filing and recording of its articles of incorporation or organization and on the 15th day of July, A. D. 1890, the capital stock of said defendant, Oconto Water Company, was all subscribed for as stated in said bill of complaint.

Eleventh. They admit and allege that thereafter and on the 15th day of July, A. D. 1890, a meeting of all of the said subscribers to such capital stock was held at said company's office in the city of Oconto, Wisconsin, the place of its location, at which the said C. C. Garland, F. H. Todd and F. B. Barnes, mentioned in the bill of complaint herein, were unanimously elected directors of said company, which directors thereafter and on the same day held a meeting at which they unanimously elected the said C. C. Garland president and the said F. H. Todd secretary and treasurer of said company.

Twelfth. They deny that, except as hereinafter stated, any certifi-

cate or share of the capital stock of said company was ever in any way or manner issued, delivered or assigned to any person or persons whomsoever.

Thirteenth. They admit that no subscription to the capital stock of said company other than as stated in said bill of complaint and above admitted was ever made.

Fourteenth. They admit and allege that on the 9th day of July, A. D. 1890, the defendant City of Oconto duly passed and thereafter caused to be published and recorded, so that the same became operative on or before July 15, 1890, the ordinance referred to in said bill of complaint, which is known as ordinance No. 153 of said city.

Fifteenth. They admit that on or about September 13, A. D. 1890, there were executed and delivered to these defendants, Andrews & Whitcomb, by the said C. C. Garland and F. H. Todd mentioned in the bill of complaint, officially as therein stated, two instruments in writing in some respects like those of that date mentioned and referred to in the bill of complaint herein, but none others, the one first in said bill of complaint mentioned being, when so delivered, in the words and figures of "Exhibit A" and the other one being, when so delivered, in the words and figures of "Exhibit B," both hereto attached and here referred to and made a part of this answer,
both of which instruments were executed and delivered under
105 the circumstances and for the purposes and as herein stated and not otherwise.

Sixteenth. They admit that no stock or any certificate or certificates for any share or shares of stock of said defendant Oconto Water Company were issued or delivered to these defendants, S. D. Andrews and W. H. Whitcomb or either of them, prior to October 18, A. D. 1890, on or about which date they admit and allege that the entire capital stock of said company was issued and delivered to them under the circumstances and for the purposes and as hereinafter stated and not otherwise.

Seventeenth. They admit that no bonds of said defendant company were issued or delivered to these defendants, Andrews & Whitcomb or to either of them, prior to November 18, 1890, on or about which date they admit and allege that one hundred thousand dollars in the bonds of said company were issued and delivered to them under the circumstances and for the purposes and as hereinafter stated and not otherwise.

Eighteenth. They deny that the defendant Oconto City Water Supply Company, has or claims to have, or ever had or claimed, any interest in any of the property or premises referred to in said bill of complaint, or in the franchise granted the defendant Oconto Water Company by said city of Oconto, as aforesaid, either as a subsequent purchaser or incumbrancer or otherwise.

Nineteenth. They allege that except as hereinbefore and hereinafter stated, admitted or denied, no allegation of the bill of complaint herein is true.

Twentieth. Further answering the said bill of complaint these defendants allege and charge the fact to be that the defendant, The

City of Oconto, prior to the 8th day of July, A. D. 1890, being desirous of having a water-works system or plant constructed, operated and maintained within its limits and of granting a franchise therefor to a corporation to be incorporated and organized to receive the grant, advertised for bids and proposals in that behalf, which resulted in the acceptance by said city of a bid or proposal therefor of which and all the rights and privileges belonging thereto the defendant, Charles C. Garland, became and was on said 8th day of July, A. D. 1890, the sole owner and beneficiary, and for the purpose of enjoying the same the said Garland, at his own expense, procured the incorporation of the defendant Oconto Water Company to receive the grant of the franchise therefor and procured the several persons named in the bill of complaint herein, to wit: F. B. Barnes, J. W. McCabe, and W. E. Krippene to become the incorporators thereof, and the defendant Oconto Water Company was
106 accordingly duly incorporated under the laws of the State of Wisconsin, on said 8th day of July, A. D. 1890, with said city of Oconto as the place of its location. That thereafter and on the next day said city of Oconto, in accordance with and in performance of its obligations to the said Garland under the bid or proposal so accepted by said city as aforesaid and at the sole instance and request of the said Garland and in recognition of his rights in the premises, duly granted the said defendant Oconto Water Company, by its said ordinance No. 153 hereinbefore mentioned, upon the terms and conditions therein stated, the franchise to construct, operate and maintain in said city of Oconto a system of water works, which grant the said company thereafter and within the time and in the manner required by said ordinance duly accepted and the same thereby became the property of said company, and, together with its unissued stock, constituted the entire property of said company up to the time the said company began placing material into its plant as hereinafter stated.

Twenty-first. That a true copy of said ordinance No. 153, except provisions fixing maximum rates to be charged private consumers for water, is hereto attached marked "Exhibit C," which is here referred to and hereby made a part of this answer.

Twenty-second. That thereafter, and on or before July 15, A. D. 1890, and prior to the organization of said defendant, Oconto Water Company, subscription was duly made to the entire capital stock of said company as follows:

By the said C. C. Garland for 990 shares.
By the said F. H. Todd for 7 shares.
By the said F. B. Barnes for 1 share.
By the said J. W. McCabe for 1 share, and
By the said W. E. Krippene for 1 share.

And thereupon and upon the same day the said subscribers, as such, held their first meeting and kept a record of all of the proceedings thereof, which proceedings were as shown by said record and said record was and is in the following words and figures, viz:

"Oconto Water Company.

"*Meeting for Organization, Oconto, Wisconsin, July* 15, 1890, *Six p. m.*

"The first meeting of the stockholders of the Oconto Water Company was held at Hotel Pierce, in the city of Oconto, Oconto county, Wisconsin, this day pursuant to articles of organization and to notice duly given to all the signers of the articles aforesaid,
107 and to all the other subscribers to the stock of said corporation; all of said signers and subscribers were present in person except J. W. McCabe and W. E. Krippene, who appeared at said meeting by F. B. Barnes of Oshkosh, Wisconsin, their legal attorney-in-fact, as shown by his letters of attorney presented and placed on file.

"It appeared by the subscription pages of this book that fifty thousand (50,000) dollars of the capital stock of this company had been duly subscribed.

"Messrs. F. B. Barnes, C. C. Garland and F. H. Todd being present, on motion C. C. Garland was chosen temporary chairman of the meeting and F. B. Barnes temporary secretary.

"On motion of F. B. Barnes the meeting proceeded to ballot for directors of the corporation in accordance with the articles of incorporation. F. B. Barnes was appointed by the chairman to collect and count the votes and he reported the whole number of shares voting to be five hundred (500) and that all thereof were cast for the following-named persons to serve until the next annual meeting of the stockholders of the company or until their successors were elected, to wit: C. C. Garland, F. H. Todd, F. B. Barnes, all of whom were thereupon declared elected as such directors.

"The following resolution was presented by F. B. Barnes, seconded by F. H. Todd, and vote being taken thereon, was unanimously adopted, to wit:

"'Resolved, That the board of directors of this corporation —, and they are hereby authorized and directed to purchase the necessary real estate at and near the said city of Oconto, Wisconsin, as may be necessary for the uses of the company, at such rates as they may be able to secure the same, and also to receive proposals and to contract for the erection and construction of such buildings and works as may be necessary for such water works complete.'

"On motion the seal of the corporation was adopted as impressed on the margin of this page.

Corporate Seal, Oconto Water Company, Oconto County, Wis.

"Meeting of stockholders was thereupon adjourned subject to future call of the president or majority of the board of directors on seven (7) days' notice.

"F. B. BARNES,
"*Secretary pro Tem.*"

Twenty-third. That thereafter and on the same day the directors so elected held their first meeting and kept a correct record of all of the proceedings thereof, which proceedings were as shown by said

record, which record was and is in the following words and figures, viz.:

"*Directors' Meeting, Oconto, Wisconsin, July* 15, 1890.

"A meeting of the directors of the Oconto Water Company
108 was called to order by F. H. Todd immediately upon the adjournment of the stockholders' meeting before recorded at the same place. Present: Directors C. C. Garland, F. H. Todd, F. B. Barnes. C. C. Garland reported at the meeting that the sum of twenty thousand ($20,000) dollars of the capital stock subscribed had been placed in his hands and would be paid over to the treasurer upon his election. On motion the meeting proceeded to the election of officers for the ensuing year. C. C. Garland was placed in nomination for president of the corporation and the votes of all the directors present being cast for him he was declared elected to said office.

"F. H. Todd being placed in nomination for the treasurer of the corporation and the votes of all the directors present being cast for him was declared elected to said office.

"F. H. Todd being placed in nomination for the secretary of the corporation and the votes of all the directors being cast for him was declared elected to said office.

"On motion President C. C. Garland was directed to pay over to the treasurer the subscription to the capital stock paid in.

"The treasurer reported the sum of twenty thousand ($20,000) dollars received from President C. C. Garland for subscription on stock.

"On motion the following resolution was unanimously adopted, to wit:

"'Resolved, That the Oconto Water Company do and does hereby accept all of the terms and conditions of an ordinance passed by the common council of the city of Oconto, Wisconsin, and approved by the mayor of said city on the ninth day of July, 1890, entitled "An ordinance providing for a supply of water to the city of Oconto, and its inhabitants, and authorizing the Oconto Water Co., its successors, and assigns to construct, operate and maintain water works therein," and of the franchise thereby granted, and the president and secretary of the said Oconto Water Company *is* hereby empowered and authorized to sign, seal, acknowledge and deliver a copy of this resolution of acceptance to the city clerk of the city of Oconto to be filed in the office of said clerk, and to do and perform any and all other acts necessary to accomplish a complete acceptance of said ordinance and said franchise on the part of the said Oconto Water Company, and to execute and deliver the bond therein provided for in such manner and form as shall conform to the terms and provisions of said ordinance with reference thereto, so as to have the effect in connection with the passage, approval and publication of said ordinance, of making a binding contract between said city and said Oconto Water Company.'

109 "On motion meeting adjourned to meet at the call of the president.

"F. H. TODD, *Secretary.*"

Twenty-fourth. That no other meeting of stockholders or directors was ever had until October 29, A. D. 1890.

Twenty-fifth. That, although the incorporators of said company and subscribers to its stock as hereinbefore stated, neither the said Barnes, McCabe or Krippene had at any time, nor did they or either of them ever claim any beneficial interest in said company, its property or any of its stock, their connection with said company being at all times solely in the interest, for the benefit and in trust and upon and as and for the account of the said Garland.

Twenty-sixth. That thereafter and on the 28th day of August, A. D. 1890, said company by its president and secretary, viz: the said Garland and Todd, purchased of the complainant herein, and the complainant sold to said company on credit, for the agreed sum of $29,741.56, no part of which became due prior to the 13th day of October, A. D. 1890, material consisting of iron pipe for said company's water-works plant to be constructed in said city of Oconto and thereafter, pursuant to the terms of the contract of such purchase and sale, the said complainant delivered the same to said company and was paid on account thereof the sum of $7,258.15, and the judgment recovered by said complainant against said company January 2d, 1892, for $24,192.75 damages and $57.29 costs, mentioned in the bill of complaint herein, was for the unpaid part of the purchase price of such material.

Twenty-seventh. That on or about September 13, A. D. 1890, one of these defendants, viz: S. D. Andrews, but in the interest and as a member of the copartnership firm of Andrews & Whitcomb, composed of these defendants Andrews & Whitcomb, both of whom were then and have ever since been residents of the State of Maine, met the said Garland at the city of Menasha, in the State of Wisconsin, pursuant to an arrangement previously made therefor upon the solicitation of the said Garland, who was desirous of interesting said firm of Andrews & Whitcomb in said water-works enterprise. That prior to such meeting neither of these defendants had ever known or met the said Garland nor had they or either of them any knowledge of said Garland or said Oconto Water Company except that such a company existed, or of any of its affairs. That at such meeting the said Garland solicited a loan of money for said company from these defendants for the purpose of aiding the
110 construction of said company's plant to a point where one hundred thousand dollars in its first-mortgage bonds, to be secured by a trust deed on all its property, then in contemplation of issue by said company, could be marketed and money realized from their sale with which to repay the loan then desired and to complete the plant and put it into operation, which the said Garland then and there represented to this defendant Andrews to be the plan of the company for raising a part of the money for the construction of said works. It was further then and there represented to this de-

fendant Andrews by the said Garland that said company's franchise to construct, operate and maintain such water works was a very valuable one, the nature and details of which he then and there fully explained in connection with such representations, and he further then and there represented to this defendant Andrews that the sum of forty thousand dollars in addition to funds then otherwise available to said company which he, the said Garland, then had on hand for that purpose, viz: ten thousand dollars would carry the construction of said works to a point that would make its bonds salable and that such construction could, in his opinion be done and the company's bonds be sold and funds realized thereon in time to repay the loan and interest as the notes to be given therefor from time to time, as installments were obtained matured. That upon learning the nature and terms of said company's franchise and seeing the same to be an exceptionally favorable one and well calculated in connection with the plant constructed as well on toward completion as fifty thousand dollars reasonably expended would carry it, to make the company's bonds, secured as stated, readily salable at par when offered and relying upon the representations made by the said Garland above set forth and believing all of the same to be true and having no notice or knowledge of any other or different facts and believing in good faith the plan of said company for the construction of said works, and stated by the said Garland as above set forth to be feasible, reasonable and safe, and knowing the same to be customary in such cases, this defendant Andrews, for said firm of Andrews & Whitcomb, in good faith promised the said Garland at said meeting that said firm of Andrews & Whitcomb would loan the said company the sum of forty thousand dollars upon the terms and conditions then and there proposed by the said Garland, viz: those stated in said contract of date September 13, 1890, the original of said "Exhibit A" of this answer, but, neither the seal of said company or this defendant Whitcomb being then at hand, a provisional memorandum of agreement in that behalf was then and there drawn up and executed in the words and figures of "Exhibit D" hereto attached, which is here referred to and made a part of this answer, which was then left with the First national bank of said city of Menasha for the benefit of all parties thereto until a new and more formal contract in the same behalf could, as it was then and there agreed by said parties should be, and which was promptly
111 thereafter made, executed, and delivered in duplicate by and between said company and these defendants, Andrews & Whitcomb, which latter contract when so delivered as aforesaid, was and is in the words and figures of "Exhibit A" hereto attached and hereinbefore referred to.

Twenty-eighth. That before the separation of the parties at such meeting at Menasha on the occasion above referred to it was mutually agreed and understood that the said Garland should have a proper assignment in writing to these defendants, Andrews & Whitcomb of the rights and franchises acquired by said company under and in virtue of said city ordinance No. 153 of said city of Oconto, at once prepared pursuant to the terms and conditions of the contract of

which "Exhibit A" is a copy, as aforesaid, and executed by him as president of said company and then forwarded to the said Todd at the said city of Oconto to be countersigned by him as secretary and sealed with the corporate seal of said company for delivery to those defendants, all of which was accordingly done, such assignment being in the words and figures of "Exhibit B" hereto attached and hereinbefore referred to.

Twenty-ninth. That between September 13th and 16th, A. D. 1890, this defendant Andrews while en route to his home at Norway, Maine, from said city of Menasha, remembering that no arrangement had been made before the separation of said parties at Menasha for making such assignment matter of record, directed the said Todd by a telegraph message to him at said city of Oconto to have the same done at said last-named city before sending it to Norway, to these defendants, and these defendants always thereafter until or about January 8, A. D. 1891, in good faith believed the same had been done and they allege and charge the fact to be that the said Todd received said message on or before September 16, 1890, at said city of Oconto and thereupon on said last-named date sent the following message by telegraph from said city to said Garland at Minneapolis, with reference thereto, viz:

"OCONTO, WIS., *September* 16, 1890.

"To C. C. Garland:

"Shall be in Chicago at Hotel Brevoort. Shall have assignment recorded and returned.

"(Signed) F. H. TODD."

That in response thereto the said Garland on the 17th day of September sent the following message by telegraph from Minneapolis to said Todd at Chicago, Illinois, viz:

112 "F. H. Todd, care Hotel Brevoort, Chicago, Illinois:

"We cannot record assignment as it is not acknowledged. It was understood at Menasha that it was not to be recorded. If that is done our credit is impaired and records will be encumbered and effect sale of bonds. I will not consent to it.

"(Signed) C. C. GARLAND."

That the said Garland on the same day from the same place, wrote the said Todd at Oconto with reference thereto as follows:

"MINNEAPOLIS, *September* 17, 1890.

"F. H. Todd, Esq., Oconto, Wis.

"DEAR SIR: I have your telegram of yesterday and today, relative to the recording of assignment, and note your purpose to record this. This, I presume, was at the suggestion of Mr. Andrews. You will doubtless recall that it was the express understanding when I signed that memorandum of agreement at Menasha that the assignment was not to be recorded. By doing so the Oconto Water Company, and likewise myself, would be very much embarrassed by

placing this assignment on record. I am utterly opposed to it and I will not consent to have it done. In fact you cannot place it on record as it is not acknowledged before a notary. Please make your figures for next month at an early date in order that we may notify Messrs. Andrews & Whitcomb in season to draw. According to our memorandum of agreement we must give them two weeks' notice before we can draw on them for any money.

"Yours truly,

"(Signed) C. C. GARLAND."

That the said Todd received both said message and letter in due course of their transmission, and did not at any time file or put on record in any way said assignment or any copy thereof, being dissuaded from doing so by said message and letter from said Garland; but neither the said Todd or Garland ever in any way or manner made it known to either of these defendants, Andrews or Whitcomb, that it had not been done, but left them to believe otherwise
113 until on or about January 8, A. D. 1891, when these defendants discovered that said assignment had never been made matter of record, and neither of these defendants ever had any notice or knowledge of any of said correspondence between the said Garland and Todd concerning the matter of putting said assignment on record until the 27th day of October, A. D. 1891, when the facts were disclosed to them by a deposition given by said Garland in another suit between the complainants herein and the Oconto Water Company.

Thirtieth. That nothing whatever was said by any one at said meeting at Menasha or at any place or time in the presence or hearing of this defendant, Andrews, or of either of these defendants, at any place, about having said assignment put or not put on record, nor was the subject ever mentioned or referred to in any way by or between any of the parties to said transaction until this defendant, Andrews, directed the said Todd as aforesaid to have it done.

Thirty-first. These defendants admit that no record of any kind was ever made of said contract, the original of said "Exhibit A," or of said assignment, the original of said "Exhibit B," except as follows, to wit: Said contract, though acknowledged, was recorded in volume 52 of deeds, on page 452, in the office of the register of deeds in and for Oconto county, Wisconsin; on the 19th day of January, 1891, and on the same day a copy thereof was duly filed and left in the office of the said clerk of said city of Oconto, and said assignment, though unacknowledged, was recorded in the office of said register of deeds in volume 52 of deeds therein, on page 447, on the 8th day of January, 1891, and thereafter on the 3d day of November, 1891, a copy thereof was filed and left in the office of the city clerk of said city of Oconto, but these defendants allege and charge the fact to be that it was owing alone to the bad faith of said Garland in that behalf as hereinbefore stated, that said assignment was not filed in the office of said city clerk as soon as the same was executed.

Thirty-second. That directly after the execution as hereinbefore

set forth of said contract and said assignment, the originals of said "Exhibits A and B," hereto attached, these defendants, in good faith and in full belief and understanding that all of the representations and statements so as aforesaid made by the said Garland to this defendant Andrews at said meeting at Menasha were true and that the said Oconto Water Company's affairs were as there stated by them and that said assignment had been made matter of record in said city of Oconto by the said Todd pursuant to this de-
114 fendant Andrews' directions to him in that behalf as hereinbefore stated, commenced making advancements of money to said Oconto Water Company under and as required by the terms of said contract, the original of said "Exhibit A," remitting the same from their said place of residence in the State of Maine to said company, and continued so to do and to receive the promissory notes of said company therefor pursuant to the provisions of said contract until they had actually advanced to said company the full sum of forty thousand dollars in lawful money of the United States and had fully performed all the conditions of said contract on their part.

Thirty-third. That it was understood and agreed by and between these defendants and said officers of said Oconto Water Company at the time of the execution of said contract and said assignment that certificates of shares of the entire capital stock of said company, viz: one thousand shares, should be properly executed and delivered to these defendants by said company in pledge and as collateral security as provided in said contract, as soon as the stock certificate book of said company was printed and that one hundred thousand dollars in the first-mortgage bonds of said company secured by the trust deed provided for in said contract should, as soon as such trust deed and such bonds could be prepared, printed and certified, be delivered in pledge and as collateral security to these defendants by said water company, all as provided for in said contract.

Thirty-fourth. That the stock certificate book of said defendant Oconto Water Company, which when printed consisted of five hundred pages, each page of which consisted of a blank certificate of its stock and its appropriate stub, each numbered consecutively from one to five hundred, each, except as to the number thereof, in the form of "Exhibit E," hereto attached, which, together with the printed blank form for its transfer on the back thereof, is here referred to and made a part of this answer, was not printed until on or about the first day of October, 1890.

Thirty-fifth. That upon obtaining said stock certificate book said company's president and secretary, viz: the said Garland and Todd, at said company's office in said city of Oconto, on the first day of October, 1890, in order to make and keep a record in said book of the names and number of shares of the respective stockholders of said company—no other stock record of any kind being or ever having been kept by said company except the original stock subscription list hereinbefore referred to in form, filled out stock certificate No. 1 of said book and its stub, for one share to said F. B. Barnes, and No. 2 for one share to said J. W.

McCabe and No. 3 for one share to said W. E. Krippene
115 and No. 4 for 490 shares to said Charles C. Garland and No. 5 for 7 shares to said F. H. Todd, and on the second day of October, 1890, No. 6 for 500 shares to said C. C. Garland, the same being respectively the number of shares subscribed for as hereinbefore stated by each of said above-named persons, and signed and sealed the same with the corporate seal of said company, making at the same time the proper entries upon the stub of each of said certificates, in all respects the same as though each certificate was ready to be delivered as full paid-up stock to the person therein named, but these defendants allege that none of said certificates were ever delivered by said company to any one and that all of them at all times remained in the actual custody and possession of said Garland and Todd as officers of said company and as custodians of said certificates for said company.

Thirty-sixth. That before the stock certificate book of said company was printed and some time in the month of August, A. D. 1890, but upon what day of said month these defendants do not know and are unable to state, the said Barnes, McCabe and Krippene, severally, each for himself by a separate instrument in writing under his hand and seal and in the presence of two subscribing witnesses sold, assigned, transferred and set over unto the said Charles C. Garland any and all interest in and to the capital stock of the said Oconto Water Company which he then had or might have or be in any manner entitled to under and by virtue of any and all subscriptions by him theretofore made to the capital stock of said Oconto Water Company and by the same instrument authorized and directed the proper officer or officers of said company to issue or cause to be issued to the said Charles C. Garland any certificate or certificates of stock in said company which he was then, or might at any time become entitled to if his said subscription was fully paid, meaning and intending by said instrument, and so expressing the same therein, to release and relinquish to the said Garland all his interest in said company and all rights thereunder.

Thirty-seventh. That on the second day of October, A. D. 1890, certificates Nos. 1, 2 and 3 of the capital stock of said company having on the day before, as hereinbefore stated, been filled out to the said Barnes, McCabe and Krippene, respectively, the said Charles C. Garland procured the said Barnes, McCabe and Krippene, respectively, to fill out and sign the blank form upon the back of the certificate so as aforesaid filled out to him, for the assignment and transfer thereof to him, the said Garland.

Thirty-eight. That thereafter on the 2nd day of October, 1890, at said company's office in said city of Oconto, without the
116 knowledge or consent of either of these defendants and while each of these defendants was absent from said city of Oconto and at his place of residence in said State of Maine, and before either of these defendants were aware that the stock certificate book of said company had been printed or obtained by said company and without any notice or knowledge on the part of either of these defendants that any certificates of the capital stock of said company had

ever been filled out to any one, the said Charles C. Garland filled out and signed the blank form of assignment on the back of each of said certificates Nos. 4 and 6 of the capital stock of said company so as aforesaid filled out to him, the said Garland, in form, selling, assigning and transferring each of the same to the defendants, and the said F. H. Todd on the same day filled out and signed the blank form of assignment on the back of said certificate No. 5 of the capital stock of said company so as aforesaid filled out to him, the said Todd, in form, selling, assigning and transferring the same to these defendants, so that these defendants appeared from the back of each of said certificates Nos. 4, 5 and 6 to be the owners thereof as the assignees of said Garland of said certificates Nos. 4 and 6 and as the assignees of said Todd of said certificate No. 5, all of which was done by the said Garland and Todd for the purpose of putting in pledge the said 997 shares of the capital stock of said company to these defendants as security, pursuant to the terms and conditions of said contract, the original of said "Exhibit A."

Thirty-ninth. That upon the said Garland and Todd's making such assignment upon the back of said certificates 4, 5 and 6 as aforesaid, no entry of any kind concerning the same was made upon the stub of either of said certificates or upon any books of said company, each of said stubs being left until the 18th of October, 1890, as it was originally filled out as hereinbefore stated.

Fortieth. That upon the making of such assignment upon the back of each of said certificates Nos. 4, 5 and 6 as aforesaid, the said Garland sent the same by mail to these defendants at Norway, Maine, their said place of residence, accompanied by a letter in the following words and figures, to wit:

"OCTOBER 2, 1890.

"Andrews & Whitcomb, Norway, Maine.

"GENTLEMEN: According to promise I have the pleasure of enclosing you herewith certificates Nos. 4, 5 and 6 of the Oconto Water Company; No. 4 for 90 shares, No. 5 for 7 shares and No. 6 for 500 shares. These are transferred in blank. Would have put your names in power of attorney, but thought you might want to use them as collateral, in which case it would be better for you to have them in blank. Three other certificates only have been
117 issued, for one share each to the three original incorporators. These will be transferred to me within the next few days. I understand by Mr. Todd that you prefer that we keep three shares of the stock, in which case we will retain the three that have been made to the original incorporators. Mr. Todd has just informed me that he has forwarded to you the assignment of the franchise, so by the time this reaches you you will have in your possession the transfer of the franchise and the stock of the company.

"My attorney is pushing the trust deed as rapidly as possible, and as soon as it is prepared will have the bonds engraved, etc. You are assured that I will not delay matters a moment longer than can be helped. You doubtless are aware that lawyers and printers are very difficult to push; however, I will keep at them the best I can.

My attorney tells me that he could get out a trust deed in two days if I wanted that kind of a deed, but if I want a good job and one that will stand the closest investigation by good corporation attorneys he must take a sufficient time to prepare it properly. Have just received your favor of the 29th.

"Very truly, C. C. GARLAND."

Forty-first. That these defendants received said certificates and letter by due course of mail at Norway, on or about the 7th day of October, A. D. 1890, and at once returned the same to said C. C. Garland, accompanied by a letter in the following words and figures, to wit:

"NORWAY, ME., *October* 7, 1890.

"C. C. Garland, Esq., Minneapolis, Minn.

"DEAR SIR: Yours of the 2d inst., enclosing certificates of stock, is received. Today we shall return it to you for it is of no value to us as security in its present shape.

"The stock should be issued to us direct for the reason that the company's books now show this stock to be yours and not ours, and should trouble arise could be attached and held as your property. Our object in having you and Mr. Todd hold a small amount of the stock was to keep the organization all right.

"Mr. Andrews will be on the ground to represent this stock at any meeting you may hold, or he can give proxy. I think you will comprehend the situation without further explanation. Please send the new stock at once to me, as Mr. Andrews may get away before it reaches here.

"Yours truly, W. H. WHITCOMB,
"For ANDREWS & WHITCOMB."

118 Forty-second. That said Garland received said certificates and letter by due course of mail on or about October 18, 1890, and at once, and on that date, caused the word "cancelled," to be written across the face of each of said certificates Nos. 4, 5 and 6 and an entry to be made upon the stub of each of said certificates under the printed words "dates of surrender" thereon as follows: "Oct. 18, 1890," and the said Garland and Todd at once thereafter, and on said 18th day of October, 1890, filled out certificates Nos. 7, 8 and 9 for 300 shares each, and certificate No. 10 for 97 shares, all to these defendants, Andrews & Whitcomb, and signed the same officially and sealed the same with the corporate seal of said company and made the proper notations in the stub of each of said certificates 7, 8, 9 and 10 showing said certificates to have been issued to these defendants on the 18th day of October, 1890, and at once, and on the same day, forwarded said certificates Nos. 7, 8, 9 and 10 to these defendants at Norway, Maine, accompanied by a letter in the following words and figures, to wit:

"OCTOBER 18, 1890.

"Messrs. Andrews & Whitcomb, Norway, Maine.

"GENTLEMEN: I have your esteemed favor of the 7th inst. written by Mr. Whitcomb, enclosing the Oconto stock certificates.

This letter was received just about as I was to take the train for Oconto. I enclose you herewith stock certificates as requested.

"I have today drawn upon you for twenty-five hundred dollars ($2,500.00) and wired you to that effect. The bonds I am now having engraved, and will have them executed at the earliest date possible.

"Mr. Andrews will doubtless keep you posted from Oconto.

"Very sincerely yours, C. C. GARLAND."

Which certificates and letter were received by these defendants at Norway, Maine, by due course of mail and retained by them.

Forty-third. That no entry of any kind was ever made upon the stock certificate book of said Oconto Water Company showing that these defendants held said certificates 7, 8, 9 and 10 as pledges thereof until some time in the month of December, 1890, when the secretary of said company, to wit: the said F. H. Todd, wrote in ink across the face of the stub of each of said certificates Nos. 7, 8 and 9, in legible writing, as follows:

119 "This stock is owned by C. C. Garland and issued to Andrews & Whitcomb merely as collateral.

"(Signed) F. H. TODD, *Secretary.*"

And wrote in ink across the face of the stub of said certificate No. 10, in legible writing, as follows:

"Ninety (90) shares of this stock is owned by C. C. Garland and seven (7) shares is owned by F. H. Todd and issued to Andrews & Whitcomb merely as collateral.

"(Signed) F. H. TODD, *Secretary.*"

Forty-fourth. That on the 15th day of October, 1890, the said Garland, in order to have a working membership of said corporation, procured and induced certain employés of said company, viz: one Matt. S. Wheeler, and one A. J. Elkins, and one N. S. Todd, to each take one of the certificates of stock originally subscribed for by the incorporators of said company, viz: the said Barnes, McCabe and Krippene, and held the same in trust for the benefit of the said Garland in all respects as said certificates Nos. 1, 2 and 3 had been taken and held by the said Barnes, McCabe and Krippene, respectively, and thereupon and on said 15th day of October, 1890, the said Garland, to whom the rights of each of said incorporators in said several certificates of stock had been assigned as hereinbefore stated, caused the word "canceled" to be written upon the face of each of said certificates and the words and figures "October 15, 1890," under the printed words "dates of surrender" upon the stub of each of said certificates, and then on said 15th day of October, 1890, said Garland and Todd, as officers of said company, filled out certificate No. 11 of said certificate book and its stub for one share to one Matt. S. Wheeler in lieu and in the place of said certificate No. 1, with the knowledge and consent of said Wheeler, and certificate No. 12 of said stock certificate book and its stub for one share to one A. J. Elkins, in lieu and in the place of said certificate

No. 2, with the knowledge and consent of said Elkins, and certificate No. 13 of said stock certificate book and its stub for one share to the said N. S. Todd, in lieu and in the place of said ceriificate No. 3, with the knowledge and consent of the said N. S. Todd, and then signed and sealed each of said certificates in all respects the same as if each was to be issued as full paid-up stock to the person named therein, but neither of said certificates was ever de-
120 livered to the persons respectively named therein, and each of said certificates always remained in the actual possession of the officers of said company as custodians thereof for said company.

Forty-fifth. These defendants admit that neither the said Wheeler, Elkins or N. S. Todd ever paid any consideration for the certificates so as aforesaid issued to him, but these defendants allege and charge the fact to be that each of said persons, the said Wheeler, Elkins and N. S. Todd took said certificates, respectively, as between themselves and the said Garland, upon the account of said Garland and held the same in trust for him subject to the rights of these defendants therein, and always thereafter until they severally transferred and assigned their several interests in said certificates of stock as hereinafter stated, voted said stock respectively at stockholders' meetings of said company.

Forty-sixth. That upon the receipt of said 997 shares of the capital stock of said company so as aforesaid issued and delivered to these defendants by the officers of said company, and on the 22d day of October, 1890, these defendants executed and delivered to the said Charles C. Garland a receipt therefore in writing in the following words and figures, to wit:

"Know all men by these presents, that we, Andrews & Whitcomb, of Norway, Maine, do hereby acknowledge the receipt this day from Charles C. Garland, of Minneapolis, Minnesota, of four certificates issued to us and representing nine hundred and ninety-seven (997) shares of the capital stock of the Oconto Water Company, a corporation duly organized and now existing under and by virtue of the laws of the State of Wisconsin, being certificates of stock numbers 7, 8, 9 and 10 in said company, which stock is held by us as collateral to secure the payment to us of all moneys which may be by us advanced, and the performance of all other things called for by the terms of that certain contract in writing made and entered into in duplicate between us and the said company, a copy of which contract is hereto attached, marked 'Exhibit A,' and made a part hereof.

"Witness our hands this 22nd day of October, 1890.

"(Signed) ANDREWS & WHITCOMB."

That the contract herein referred to as "Exhibit A" was the original of "Exhibit A" of this answer, and a copy thereof was attached thereto when the same was so delivered.

Forty-seventh. That thereafter and on the 29th day of October, A. D. 1890, the situation as to the stock of said company remaining as last above set forth, the said Charles C. Garland, F. H. Todd, Matt. S. Wheeler, A. J. Elkins and N. S. Todd held a meeting at the

office of said company in said city of Oconto, as the stockholders of the entire capital stock of said Oconto Water Company,
121 pursuant to the written consent of all of said parties so to do, written and signed by said parties in the record book of the proceedings of said company in words and figures following, that is to say:

"OCONTO, WIS., *October* 29, 1890—7.30 p. m.

"We, the undersigned, being all the stockholders in the Oconto Water Company, each owning the number of shares of stock in said company set opposite our respective signatures hereto, and all being now present at the office of said company in the city of Oconto, in the State of Wisconsin, do hereby expressly consent to the holding of a meeting of the stockholders of said company at this time and place.

Name.	Shares of stock.
Charles C. Garland	990 shares.
F. H. Todd	7 "
Matt. S. Wheeler	1 "
A. J. Elkins	1 "
N. S. Todd	1 "

Forty-eighth. That pursuant to such consent of said stockholders to hold a stockholders' meeting of said company at the time and place therein specified, the said Garland, F. H. Todd, Wheeler, Elkins and N. S. Todd, thereupon held at the said time and place a stockholders' meeting of said company all being present and voting the number of shares set opposite their names respectively as last above set forth, at which meeting certain proceedings were had and a record kept thereof in the record book, kept by said company, which proceedings were as shown by said record, which was and is in the following words and figures, viz:

"The meeting was called to order by Charles C. Garland, president of the company. The records of the last meeting of the stockholders having been read, on motion of N. S. Todd, the same were approved and adopted. On motion of F. H. Todd, the following preamble and resolutions were adopted by an unanimous vote, 1,000 shares of stock being voted in favor of the adoption thereof, which said preamble and resolution is as follows, to wit:

"Whereas, at a meeting of the incorporators, subscribers to stock and stockholders of this company, duly called and held at the city of Oconto, in the State of Wisconsin, on the 15th day of July, 1890, at 6 o'clock p. m., a resolution was unanimously passed authorizing and directing the board of directors of this company to receive proposals and make contracts for the erection, construction and complete equipment of the system of water works in said city of
122 Oconto, contemplated in and by that certain ordinance of said city hereinafter more particularly referred to; and

"Whereas, in pursuance of the terms of said resolution so as aforesaid passed the said board of directors, on behalf of this company and in its name, and by its proper officers, did on the 13th day of

September, 1890, enter into a contract in writing, bearing date on that day, with S. D. Andrews and W. H. Whitcomb, both of Norway, Maine, under the provisions whereof the said Andrews & Whitcomb, on certain terms and conditions therein stated, agreed to furnish to this company certain sums of money to be applied towards the payment of the cost of completing said system of water works, said sums of money not to exceed in the aggregate, however, the sum of forty thousand dollars ($40,000), which said contract was duly executed in duplicate, and one original of which is now on file with the books and papers of this company, and is hereby referred to and made a part hereof; and,

"Whereas, since the execution as aforesaid of said contract with said Andrews & Whitcomb, and on the 17th day of September, 1890, this company, through its proper officers, entered into a contract in writing, bearing date on that day, with Charles C. Garland of Minneapolis, Minnesota, under the provisions whereof the said Garland, on certain terms and conditions therein stated, agreed to erect, construct and fully equip the said system of water works, so that when so erected, constructed and equipped the same should comply substantially with all the terms, provisions and requirements of that certain ordinance passed by the common council of said city of Oconto, approved by its mayor on the 9th day — July, 1890, and entitled, 'An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and authorizing the Oconto Water Company, its successors or assigns to construct, operate and maintain water works therein,' which said contract was duly executed in duplicate and one original of which is now on file with the books and papers of this company, and is hereby referred to and made a part hereof; and,

"Whereas, pursuant to the terms and provisions of said contract between this company and said Garland, to which reference is hereby made, the officers of this company did on or about the third day of October, 1890, cause to be issued to said Garland the nine hundred and ninety shares of the capital stock of this company by him theretofore subscribed for, the same having then been fully paid for by said Garland, by services rendered and material furnished, and obligations incurred and assumed by him in and about the
123 securing of the franchises and privileges in said ordinance granted and in and about the erection and construction by him of said system of water works, according to his agreement in said written contract set forth; and,

"Whereas, by the terms of said contract with said Garland it was agreed that said Garland should have and enjoy all the advantages that might have been had or enjoyed by this company under its said contract with said Andrews & Whitcomb, and that this company would do or cause to be done any and all things which might be necessary to cause the said Andrews & Whitcomb to carry out well and truly the provisions and agreements by them made to and with this company in their said written contract, on condition that the said Garland should assume and forever hold this company harmless from any loss or liability which might accrue to this com-

pany by reason of its carrying out of the conditions upon it imposed, and the promises by it made in said written contract with said Andrews & Whitcomb, all of which said conditions and promises in its said agreements with said Garland this company duly promised to meet and carry out; and,

"Whereas, the said Garland, in pursuance of the terms of said contract between this company and the said Andrews & Whitcomb, by him assumed as aforesaid, did, on the 18th day of October, 1890, assign, transfer and set over to said Andrews & Whitcomb at their request and as collateral to secure the prompt payment of moneys by them advanced and to be advanced under their said contract the nine hundred and ninety shares of the capital stock of this company there-fore issued as aforesaid by him, and did cause said assignment and transfer of said stock to be entered upon this company's book of stock certificates, and did surrender and deliver up to this company the certificates of stock theretofore issued to him as aforesaid and did cause to be issued to said Andrews & Whitcomb as collateral as aforesaid certificates of stock in this company representing in the aggregate nine hundred and ninety shares; and,

"Whereas, the stock so as aforesaid issued to said Andrews & Whitcomb is held by them as collateral to secure the payment to them of any moneys which have been or may hereafter be by them advanced under their said contract with this company, which fact more fully appears in the receipt of said Andrews & Whitcomb for said stock, executed in duplicate to said Garland and dated the 22d day of October, 1890, one of the originals whereof is now on file with the books and papers of this company; and,

"Now, therefore, be it resolved, That all the acts, matters and things and each thereof set forth in the foregoing recitals as having been done or performed either by this company or by the board of directors of this company or by any officer or agent of this company, or by any person or persons in the name or on behalf of this
124 company, whether such acts, matters or things or any thereof were properly and legally authorized before they were so done and performed, or not, or whether any proper record of such acts, matters or things has been entered upon the books of record of this company, or not, be and the same and each thereof are hereby adopted, ratified, confirmed and to all intents and purposes made as binding and effectual as against this company, as if such acts, matters and things, and each thereof had been in each instance especially authorized by the stockholders of this company, and particularly so far as the foregoing recitals set forth the making of the said contract between this company and the said Andrews & Whitcomb and the said Charles C. Garland, or any act, matter or thing in any way pertaining to said contracts or either of them, it being intended hereby to expressly ratify, adopt and confirm said two contracts and each of them.

"On motion of Matt. S. Wheeler, by a unanimous vote, the secretary of this company was instructed to place upon the book of records of this company, following the records of this meeting, full and complete copies of the contracts and instruments which are referred to

respectively in the foregoing preamble and resolutions introduced by F. H. Todd, as the contract between this company and S. D. Andrews and W. H. Whitcomb, both of Norway, Maine, and as the contract between this company and Charles C. Garland, and as the receipt of said Andrews & Whitcomb to said Garland, dated the 22d day of October, 1890.

"On motion of Matt. S. Wheeler it was voted to adjourn, to meet at this place at 8.45 p. m. of this 29th day of October, 1890.

"Attest: F. H. TODD, *Secretary.*"

That immediately following the above record upon the record book of said company there was written and signed therein a certificate in the following words and figures, to wit:

"We, the undersigned, being all of the stockholders of the Oconto Water Company, do hereby certify that the foregoing is a true and correct record of the meeting of the stockholders of said company, held at its office in the city of Oconto, in the State of Wisconsin, on the 29th day of October, 1890, at 7.30 o'clock p. m.

"CHARLES C. GARLAND.
"F. H. TODD.
"MATT. S. WHEELER.
"A. J. ELKINS.
"N. S. TODD."

125 And immediately following said certificate there was copied into said record book, first the contract between the said Garland and the said company referred to in said preamble and resolutions adopted as aforesaid by said stockholders at said meeting, which contract was and is in the words and figures of "Exhibit F" hereto attached, which is here referred to and made a part of this answer, and immediately following the record of said contract in said book as aforesaid there was copied into said book the said contract between these defendants and the said company of date September 13, 1890, being the original of "Exhibit A" attached to this answer, and immediately following the copy of said contract between these defendants and the said company last above referred to there was copied into said record book the receipt given by these defendants to the said Garland for said 997 shares of stock as hereinbefore stated, all of which was copied into said book on or about the 27th day of October, A. D. 1890.

Forty-ninth. That immediately following the adjournment of said meeting of stockholders on said 29th day of October, 1890, as recited in the record of the proceedings thereof hereinbefore set forth, there was held a meeting of the directors of said company at the same place, at which certain proceedings were had and a record kept thereof in said record book of said company, which proceedings were as shown by said record, which was and is in the following words and figures, to wit:

Directors' Meeting, October 29, 1890.

"OCONTO, WIS., *October* 29, 1890—8.30 p. m.

"We, the undersigned, being all the directors of the Oconto Water Company, and being all now present at the office of said company, in the city of Oconto and State of Wisconsin, do hereby expressly consent to the holding of a meeting of the directors of said company at this time and place.

"CHARLES C. GARLAND,
"F. H. TODD,
"*Of the Board of Directors.*"

"OCONTO, WIS., *October* 29, 1890—8.30 p. m.

"Pursuant to the foregoing written consent signed by two of the directors of the Oconto Water Company and pursuant to notice thereof heretofore duly given to each and all of the members of said board of directors, a special meeting of the board of directors of said company was held at the office of said company in the city of Oconto, in the State of Wisconsin, on the 29th day of October, A. D. 1890, at 8.30 p. m.

126 "Present: C. C. Garland and F. H. Todd.

"Meeting was called to order by Charles C. Garland, president of the company.

"Mr. F. H. Todd read a communication from Mr. F. B. Barnes, one of the directors of this company, of which the following is a true copy:

"OSHKOSH, WIS., *August* 6, 1890.

"Oconto Water Company, Oconto county, Wisconsin.

"GENTLEMEN: I hereby tender my resignation as a director of the Oconto Water Company, and request that the same be acted upon and accepted at once.

"Yours respectfully,
"(Signed) F. B. BARNES.

"On motion of F. H. Todd the resignation of Mr. F. B. Barnes from the board of directors of this company was unanimously accepted.

"On motion of F. H. Todd it was unanimously voted to proceed to the election of a director to fill the vacancy caused by the resignation of Mr. F. B. Barnes.

"F. H. Todd was appointed by the chair teller to receive and count votes, and reported: Whole number of votes cast two, both of which were for N. S. Todd, and the chair thereupon declared N. S. Todd duly elected a director of this company for the unexpired portion of the term for which F. B. Barnes was elected.

"On motion of F. H. Todd it was voted to adjourn.

"Attest: F. H. TODD, *Secretary.*"

127 Forty-nine and one-half. That immediately following the adjournment of said last-mentioned meeting of the directors of said company there was held at the same place another stock-

holders' meeting pursuant to the adjournment of the last preceeding meeting of said stockholders, at which certain proceedings were had which were as shown by the record of the proceedings thereof in the said company's record book, which was and is in the following words and figures, to wit:

Stockholders' Meeting, October 29, 1890.

"OCONTO, WIS., *October* 29, 1890—8.45 p. m.

"Pursuant to adjournment a special meeting of the stockholders of the Oconto Water Company was held at the office of said company, in the city of Oconto, in the State of Wisconsin, on the 29th day of October, 1890, at 8.45 p. m., at which said meeting the following persons, being all of the stockholders in said company, were personally present, participating therein, to wit:

"Charles C. Garland, owner of 900 shares.

"F. H. Todd, owner of 7 shares.

"Matt. S. Wheeler, owner of one share.

"A. J. Elkins, owner of one share.

"N. S. Todd, the owner of one share.

"The meeting was called to order by Charles C. Garland, president of the company.

"The following resolution, presented by F. H. Todd, was adopted by an unanimous vote, 1,000 shares of stock being voted in favor of its adoption, to wit:

"'Resolved, That the action of the board of directors of this company in this day accepting the resignation of F. B. Barnes from the said board and in this day electing N. S. Todd to fill the vacancy in said board caused by said resignation, be and the same is hereby adopted, ratified and confirmed.'

"On motion of Matt. S. Wheeler it was voted to adjourn to meet at this place at 9.15 o'clock p. m. of this 29th day of October, 1890.

"Attest: F. H. TODD, *Secretary.*"

128 Fiftieth. That immediately following the adjournment of said last-mentioned meeting of the stockholders of said company there was held at the same place another meeting of the directors of said company pursuant to the written consent of all of said directors in that behalf, made and signed upon the said record book of said company as follows, to wit:

Directors' Meeting, October 29, 1890, 9 *p. m.*

"OCONTO, WISCONSIN, *October* 29, 1890—9 p. m.

"We, the undersigned, being all the directors of the Oconto Water Company, and being all now present at the office of said company in the city of Oconto, in the State of Wisconsin, do hereby expressly consent to the holding of a meeting of the board of directors of said company at this time and place.

"CHARLES C. GARLAND,
"F. H. TODD,
"N. S. TODD,
"*Board of Directors.*"

And at such meeting of directors certain proceedings were had which were as shown by the record of the proceedings thereof in said record book, which was and is in the following words and figures, to wit:

"OCONTO, WISCONSIN, *October* 29, 1890—9 p. m.

"Pursuant to the foregoing written consent, signed by all the directors of the Oconto Water Company, a special meeting of the board of directors of said company was held at the office of said company, in the city of Oconto, in the State of Wisconsin, at 9 o'clock p. m. on the 29th day of October, 1890.

"Present: Charles C. Garland, F. H. Todd and N. S. Todd.

"The meeting was called to order by C. C. Garland, president of the company.

"The records of the meeting of this board held on the 15th day of July, 1890, having been read—

"On motion of N. S. Todd, the same was approved and adopted.

"On motion of F. H. Todd, the following preamble and resolution was adopted by an unanimous vote, to wit:

"Whereas, at a meeting of the incorporators, subscribers to stock and stockholders of this company, duly called and held at the city of Oconto, in the State of Wisconsin, on the 15th day of July, 1890, at 6 o'clock p. m., a resolution was unanimously passed authorizing and directing the board of directors of this company to receive
129 proposals and make contracts for the erection, construction and complete equipment of the system of water works in said city of Oconto contemplated in and by that certain ordinance of said city of Oconto hereinafter more particularly referred to; and,

"Whereas, in pursuance of the terms of said resolution so as aforesaid passed, the said board of directors, on behalf of this company, and in its name and by its proper officers, did on the 13th day of September, 1890, enter into a contract in writing, bearing date on that day, with S. D. Andrews and W. H. Whitcomb, both of Norway, Maine, under the provisions whereof the said Andrews & Whitcomb, on certain terms and conditions therein stated, agreed to furnish to this company certain sums of money to be applied towards the payment of the cost of completing said system of water works, said sums of money, not to exceed in the aggregate, however, the sum of forty thousand dollars ($40,000), which said contract was duly executed in duplicate and one original of which is now on file with the books and papers of this company, and is hereby referred to and made a part hereof; and,

"Whereas, since the execution as aforesaid of said contract with said Andrews & Whitcomb, and on the 17th day of September, 1890, this company, through its proper officers, entered into a contract in writing, bearing date on that day, with Charles C. Garland, of Minneapolis, Minnesota, under the provisions whereof the said Garland, on certain terms and conditions therein stated, agreed to erect, construct and fully equip the said system of water works so that when so erected, constructed and equipped the same should comply substantially with all the terms, provisions and requirements of that

certain ordinance passed by the common council of said city of Oconto, approved by its mayor on the 9th day of July, 1890, and was entitled, 'An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and authorizing the Oconto Water Company, its successors or assigns, to construct, operate and maintain water works therein;' which said contract was duly executed in duplicate and one original of which is now on file with the books and papers of this company, and is hereby referred to and made a part hereof; and,

"Whereas, pursuant to the terms and provisions of said contract between this company and said Garland, to which reference is hereby made, the officers of this company did, on or about the third day of October, 1890, cause to be issued to said Garland the nine hundred and ninety shares of the capital stock of this company, by him theretofore subscribed for, the same having been then fully paid for by said Garland by services rendered and material furnished and obligations incurred and assumed by him in and about the securing of the franchises and privileges in said ordinance granted and in and about the erection and construction by him of said system of water works according to his agreement in said written contract set forth; and,

130 "Whereas, by the terms of said contract with said Garland it was agreed that said Garland should have and enjoy all the advantages that might have been had or enjoyed by this company under its said contract with said Andrews & Whitcomb and that this company would do or cause to be done any and all things which might be necessary to such enjoyment by said Garland, or which might be necessary to cause the said Andrews & Whitcomb to carry out well and truly the provisions and agreements by them made to and with this company in their said written contract, on condition that the said Garland should assume and forever hold this company harmless from any loss or liability which might accrue to this company by reason of its carrying out of the conditions upon it imposed and the promises by it made in said written contract with said Andrews & Whitcomb, all of which said conditions and promises in its said agreement with said Garland, this company duly promised to meet and carry out; and,

"Whereas, the said Garland, in pursuance of the terms of the said contract between this company and the said Andrews & Whitcomb, by him assumed as aforesaid, did, on the 18th day of October, 1890, assign, transfer and set over to said Andrews & Whitcomb, at their request and as collateral to secure the prompt payment of moneys by them advanced and to be advanced under their said contract, the nine hundred and ninety shares of the capital stock of this company, theretofore issued as aforesaid to him, and did cause said assignment and transfer of said stock to be entered upon this company's book of stock certificates and did surrender and deliver up to this company the certificates of stock theretofore issued to him as aforesaid and did cause to be issued to said Andrews & Whitcomb as collateral as aforesaid certificates of stock in this company representing in the aggregate nine hundred and ninety shares; and

"Whereas, the stock so as aforesaid issued to said Andrews & Whitcomb is held by them as collateral to secure the payment to them of any moneys which have been or may hereafter be by them advanced under their said contract with this company, which fact more fully appears by the receipt of said Andrews & Whitcomb for said stock executed in duplicate to said Garland and dated the 22d day of October, 1890, one of the originals whereof is now on file with the books and papers of this company.

"Now, therefore, be it resolved, That all the acts, matters and things, and each thereof, set forth in the foregoing recitals as having been done or performed, either by this company or by the
131 board of directors of this company or by any officer or agent of this company or by any person or persons in the name or on behalf of this company, whether such acts, matters or things or any thereof, were properly and legally authorized before they were so done and performed, or not, or whether any proper record of such acts, matters or things has been entered upon the books of record of this company, or not, be and the same, and each thereof, are hereby adopted, ratified, confirmed and to all intents and purposes made as binding and as effectual as against this company as if such acts, matters and things, and each thereof, had been in each instance especially authorized by the board of directors of this company, and particularly so far as the foregoing recitals set forth the making of the said contract between this company and the said Andrews & Whitcomb, and the said contract between this company and the said Charles C. Garland, or any act, matter or thing in any way pertaining to said contracts or either of them, it being intended hereby to expressly ratify, adopt and confirm said two contracts and each of them.

"On motion of F. H. Todd the following resolutions, ten (10) in number, and each thereof were adopted by an unanimous vote, to wit:

"Be it resolved, That, for the purpose of completing and putting into operation its system of water works now in process of construction at the city of Oconto, in the State of Wisconsin, and for the purpose of making such extensions of said system as may be deemed necessary at any time after the same shall have been so completed, this company make and execute its twenty-five (25) year first-mortgage gold bonds to the amount of one hundred and twenty-five thousand dollars ($125,000.00), which said bonds shall be in the sum of one thousand dollars ($1,000.00) each, and shall be numbered consecutively from one (1) to one hundred and twenty-five (125), both inclusive, and shall be substantially in the form hereafter in these resolutions set forth; and be it further

"Resolved, That one hundred (100) of said bonds be issued, negotiated and sold for the purpose of providing funds with which to complete and to put into successful operation said system of water works, in the manner, to the extent and according to the plan indicated in and contemplated by that certain ordinance of said city of Oconto, numbered 153, and entitled 'An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and au-

thorizing the Oconto Water Company, its successors and
132 assigns, to construct, operate and maintain water works therein,' and that the remainder of said bonds, being twenty-five (25) in number, after said system of water works shall have been so as aforesaid completed, be issued, negotiated and sold for the purpose of providing funds with which to make extensions to said system from time to time, as provided for in said ordinance, or such extensions as may from time to time be deemed advisable by said Oconto Water Company, upon the following basis and not otherwise, to wit:

"Said remaining twenty-five (25) bonds to be issued, negotiated and sold at a rate not to exceed one of said bonds for each 880 feet of water mains or pipes which may be built, laid and fully equipped by said company in or near said city of Oconto, after the completion according to the terms of said ordinance, of 'the original pipe system' in said ordinance referred to; and be it further

"Resolved, That said bonds and each thereof shall be substantially in the following form, to wit: (Here follows the form of the bond.)

"And be it further resolved, That each of said bonds shall have attached thereto fifty (50) interest coupons for the semi-annual installments of interest to become due on such bonds, and substantially in the following form except as to the date of payment, viz: (Here follows the form of the coupon.)

"And be it further resolved, That the following form of certificate be endorsed upon each and all of said bonds to be so as aforesaid issued, to wit: (Here follows the form of the certificate.)

"And be it further resolved, That for the purpose of securing the payment of said bonds, with the interest which shall accrue thereon, as and when said bonds and interest respectively become due and payable, this company make, execute and deliver to the Minneapolis Trust Company, a corporation of Minneapolis, Minnesota, a deed of trust or mortgage upon all the estate or property, real and personal and mixed, of whatsoever name, nature or description, now owned, or which may hereafter at any time be acquired, by this company, for its use, in connection with the construction, maintenance and operation of its said system of water works in said city of Oconto, including all rights, privileges and franchises which have heretofore and which may be hereafter granted to this company by said city of Oconto, and all contracts which have been heretofore and which may be hereafter made and entered into by and between this company and said city of Oconto, so far as said rights, privileges and franchises, or
said contracts relate in any way to the construction, mainte-
133 nance or operation of said system of water works or any part thereof, or any extensions thereof, and including also, all the rights, privileges, franchises, immunities, concessions, easements, contracts, tolls, rents, revenues, issues and profits of every name, nature and description, now held, owned or controlled by this company, or which may be hereafter held, owned or controlled by this company, and in any way connected with the maintenance and operation of its said system of water works or any extensions

thereof; said deed of trust or mortgage to be so as aforesaid made, executed and delivered in trust, for the equal *pro rata* benefit and security of the several holders of the bonds above mentioned, at what period whatsoever the same or any thereof may be issued, and without preference, priority or distinction of any one of said bonds over any other, as to lien or otherwise; and,

"Be it further resolved, That, to further secure the payment of said interest coupons as and when the same mature, this company make, execute and deliver to said Minneapolis Trust Company, as trustee as aforesaid an assignment in writing, assigning, transferring and setting over to said Minneapolis Trust Company, as trustee as aforesaid, all contracts which have been heretofore or which may hereafter be made and entered into by and between this company and said city of Oconto for the use of hydrants by said city, together with all its claims, rights and demands which may accrue or exist against said city at any time during the existence of any part of said bonded debt, for the use of hydrants by said city, under the ordinance hereinbefore referred to or under any ordinance or contract therefor which may hereafter be made, and that in said written assignment the said trustee and its successors in said trust, be duly made, constituted and appointed the agent of this company to receive and receipt for all sums of money which may become due and payable to this company from said city of Oconto for the use of hydrants as aforesaid during the existence of any part of said bonded debt, and in the name of this company and as its duly authorized agent to institute such proceedings and to adopt such measures as said trustee may from time to time deem necessary to collect from said city any sums of money so as aforesaid due and payable for hydrant rentals, and that said trustee be further authorized as agent aforesaid to apply all sums of money so as aforesaid received or collected from said city in each instance as follows, to wit: First, to the equal *pro rata* payment of all interest on said bonds, due and unpaid at the time of the receipt of such money; second, to retain sufficient of the balance to meet the payment of the installment of interest then next maturing; third, to the payment to this company of any balance which may then remain; and,

134 "Be it further resolved, That said mortgage or deed of trust and said written assignment of said hydrant rentals and of said contracts be drawn in such form and in such terms and with such conditions, not inconsistent with these resolutions, as are usual and customary in instruments of like character and such as may be mutually agreed upon by and between the officers of this company hereinafter authorized to make, execute and deliver the same, and the officers of said Minneapolis Trust Company, trustee, as aforesaid; and,

"Be it further resolved, That the president of this company, be and he is hereby authorized and empowered for and on behalf of this company, and as its act and deed to affix to the said deed of trust or mortgage and to each of said bonds the corporate seal of this company, and as such president to sign the same and each

thereof in the name of this company, and to cause the same and each thereof to be duly attested by the secretary of this company, and when so executed in due form of law to deliver the said deed of trust or mortgage to the said Minneapolis Trust Company, trustee as aforesaid, and that the secretary of this company be and he is hereby authorized and empowered to affix to each of said interest coupons the engraved fac-simile of his signature as such secretary; and,

"Be it further resolved, That the president of this company be and he is hereby authorized and empowered for and on behalf of this company and in its name and as its act and deed, to enter into and execute all contracts in writing or otherwise which may be by him deemed necessary or desirable for the completion of said system of water works and for putting the same into successful operation, and to negotiate and sell the first one hundred (100) bonds hereinbefore mentioned to such person or persons and on such terms and at such price or prices as he shall deem sufficient therefor, and that all contracts heretofore entered into by said president in connection with the construction of said water works and with the negotiation and sale of said bonds or any thereof be and the same are hereby adopted, ratified and confirmed.

"On motion of N. S. Todd it was voted to adjourn.

"Attest: F. H. TODD,

"*Secretary Oconto Water Company.*"

135 Fifty-first. That immediately after the adjournment of said directors' meeting, as last above stated, the said stockholders of said company held another meeting at the same place at which certain proceedings were had, which were as shown by the record of the proceedings of said meetings in said record book, to wit:

Stockholders' Meeting, October 29, 1890.

"OCONTO, WISCONSIN, *October* 29, 1890—9¼ p. m.

"Pursuant to adjournment a special meeting of the stockholders of the Oconto Water Company was held at the office of said company, in the city of Oconto, in the State of Wisconsin, on the 29th day of October, at 9¼ o'clock, p. m., at which said meeting the following persons, being all of the stockholders in said company, were personally present participating therein, to wit:

"C. C. Garland, owner of 990 shares.

"F. H. Todd, owner of 7 shares.

"Matt. S. Wheeler, owner of 1 share.

"A. J. Elkins, owner of 1 share.

"N. S. Todd, owner of 1 share.

"The meeting was called to order by C. C. Garland, president of the company.

"On motion of Matt. S. Wheeler the following resolutions were unanimously adopted, 1,000 shares of stock being voted in favor thereof, to wit:

"'Be it resolved, That the resolutions, ten (10) in number, presented

by F. H. Todd at the meeting of the directors just now adjourned, being the last meeting of said board this day held, which said resolutions and each thereof relate to the issue of this company's first-mortgage bonds to the amount of $125,000.00 and which said resolutions, and each thereof, were passed and adopted by an unanimous vote of said board of directors, be and the same are hereby adopted, ratified and confirmed by the stockholders of this company, meaning and intending by this resolution to give to said resolutions and to each thereof the same force and effect, to all intents and purposes, as if the same and each thereof had been passed *verbatim et literatim* by the stockholders of this company'

136 "On motion of A. J. Elkins it was voted to adjourn.
"Attest: F. H. TODD,
"*Secretary Oconto Water Company.*"

That immediately following the record of the proceedings of said stockholders' meeting last above referred to in said record book, the directors of said company made and signed therein a certificate in the following words and figures, to wit:

"We, the undersigned, being all the directors of the Oconto Water Company, do hereby certify that the records contained on page 32 and on pages 34 to 49, both inclusive, of this book are true and correct records of two meetings of the board of directors of said company in the city of Oconto, State of Wisconsin, on the 29th day of October, 1890, respectively at 8½ and 9 o'clock p. m.

"CHARLES C. GARLAND,
"F. H. TODD,
"N. S. TODD,
"*Board of Directors.*"

That immediately following said certificates the stockholders of said company made and signed in said book a certificate in the following words and figures, to wit:

"We, the undersigned, being all the stockholders of the Oconto Water Company, do hereby certify that the records contained on page 33, and on pages 50 and 51 of this book, are true and correct records of two meetings of the stockholders of said company, held at the office of said company in the city of Oconto, State of Wisconsin, on the 29th day of October, 1890, respectively at 8¾ and 9¼ p. m.

"CHARLES C. GARLAND.
"F. H. TODD.
"MATT. S. WHEELER.
"A. J. ELKINS.
"N. S. TODD."

All of which was done on or about the 29th day of October, 1890.

Fifty-second. That no other meeting of stockholders or directors of said company was thereafter held until January 12, 1891.

137 Fifty-third. That neither of these defendants ever had any notice or knowledge of any of the proceedings of said stock-

holders or directors at any of the meetings of said directors or stockholders held on the 29th day of October, 1890, until on or about the 12th day of January, 1891.

Fifty-fourth. That in order to further comply with the terms and conditions of said contract of September 13, 1890, between these defendants and the said Oconto Water Company, said contract being the original of "Exhibit A" of this answer, the said Oconto Water Company caused to be prepared 125 bonds, with coupons attached, all in form and according to the terms and conditions of the resolutions hereinbefore set forth, adopted by the board of directors of said company at its meeting as aforesaid on the 29th day of October, 1890, at 9 o'clock p. m., and caused each of said bonds to be duly certified by the said Minneapolis Trust Company in form and according to the terms and conditions of said resolutions, and also caused to be prepared the trust deed provided for in said resolutions to be made, executed and acknowledged in due form and delivered, all as provided for in said resolutions, which trust deed bore date November 1, 1890, and was thereafter and on the 13th day of November, 1890, duly recorded in the office of the register of deeds in and for Oconto county, Wisconsin, in volume 52 of deeds therein, on page 394, *et seq.*, and thereafter and on or about the eighteenth (18th) day of November, 1890, the said Oconto Water Company, further to comply with the terms and conditions of its said contract with these defendants of date September 13, 1890, duly delivered to these defendants 100 of said bonds in pledge and as collateral security and not otherwise, for the purposes provided for in said contract, and delivered the other 25 bonds to the said Minneapolis Trust Company for the purposes stated in said resolutions.

Fifty-fifth. That on or about November 1, 1890, these defendants, having no knowledge or information whatever of what said company was doing or had done after the execution of said instruments, the originals of "Exhibits A and B" of this answer, except to draw funds from these defendants and being anxious to know what progress was being made in the construction of said company's plant, this defendant Andrews went in person to said city of Oconto to obtain such information as he might concerning the affairs of said company and the state of its plant. That he found said company in possession of all needed material for use in its plant, the work of construction of its plant going on, but was unable, though he
138 diligently attempted so to do, to obtain any information whatever concerning the state of said company's accounts, concerning which, except its accounts with these defendants, neither of these defendants ever obtained any information save as hereinafter stated, and these defendants allege and charge the fact to be that the said Garland expressly cautioned and directed the other officers and the employés of said company who had any knowledge or information of said company's accounts to keep it from these defendants. That while this defendant Andrews was in said city of Oconto for the purpose above stated and on or about the 1st day of November, 1890, he took employment with said company to take measurements of excavations being made in the streets of said city

for the purpose of laying the pipe of said water-works plant and of keeping account thereof and of material used by said company known as "specials," being special castings or pieces for use in laying and connecting the pipe system of said company's plant, and continued in such employment until said company's pipe system was about completed, but these defendants deny that this defendant Andrews was ever in the employ of said company as its superintendent or otherwise, save as above stated, and they deny that they or either of them ever, until on or about the 7th day of January, 1891, knew or supposed, or had any notice or knowledge thereof whatever that the complainant herein or any other person or persons whomsoever had or were furnishing any material whatever for the erection or construction of said company's water-works plant or any part thereof that was not paid for, and they allege that neither of them prior to, on or about said last-mentioned date knew or supposed that said Oconto Water Company had any creditor or creditors save these defendants. They admit that they knew at all times after the respective dates thereof of the existence of the liens or encumbrances given these defendants by said company as aforesaid and of the trust deed given by said company to said Minneapolis Trust Company as aforesaid.

Fifty-sixth. That on the 22nd day of December, 1890, these defendants completed the advancement and loan to said company of said sum of $40,000 by furnishing said company on that day the sum of $5,000, for which said company then gave these defendants its note for that amount, of that date, all pursuant to the terms *and* of said contract, the original of "Exhibit A" of this answer.

Fifty-seventh. That said company, not having paid any of said notes or any part of said loan so as aforesaid made to it by these defendants, on the 1st day of January, 1891, not having
139 made a sale of any of its bonds as contemplated in and by said agreement of September 13, 1890, the said company on the 4th day of January, 1891, having the right so to do in virtue of the provisions of said contract of September 13, 1890, between it and these defendants, took up such of its notes as had been given these defendants for a portion of said loan as by their terms matured January 1, 1891, which amounted in all to the sum of $20,000.00, and gave renewal notes therefor, four in number, bearing date on that day, each being for $5,000.00 and each payable March 1st, thereafter, and paid these defendants the interest that had accrued on the notes so taken up up to the date of said renewal notes.

Fifty-eighth. That thereafter and on or about the 7th day of January, 1891, these defendants learned from the officers of said company and the facts were that the funds of said company were about exhausted and that a large amount of the material used by said company in its plant had not been paid for, and that said company had used no other funds up to that time in purchase of its material or doing its construction work than those furnished said company by these defendants under said contracts, the original of "Exhibit A" of this answer, and they allege and charge the fact to be that if twenty thousand dollars had in fact ever been paid

upon the subscriptions to the capital stock of said company as reported by said Garland at the first meeting of its board of directors as hereinbefore stated, or if the said Garland at the time of said meeting at Menasha, September 13, 1890, had on hand ten thousand dollars available for the use of said company as he then and there stated he had, as hereinbefore set forth, no part of either of said sums was ever in any way or manner used for said company, but all of the same was converted by the said Garland to his own use.

Fifty-ninth. That neither of these defendants ever had any notice or knowledge of the contract of date September 17, 1890, between the said Garland and the said Oconto Water Company referred to in the bill of complaint herein and in the preamble and resolution adopted by the stockholders of said company at their first meeting on October 29, 1890, as hereinbefore stated, until on or about the 12th day of January, 1891, when these defendants for the first time obtained access to the record book of said Oconto Water Company, showing the proceedings of its stockholders and directors at their several meetings up to that date.

And these defendants further say that it may be true, for anything these defendants or either of them know to the contrary, that said contract between the said Garland and said Oconto
140 Water Company of date September 17, 1890, above referred to, may have been executed by the parties thereto as stated in the bill of complaint herein on the 29th day of October, 1890, and antidated to the 17th day of September, 1890, but these defendants are utter strangers to all and every such matters and cannot form any belief concerning the same, but they allege that said contract was in fact reduced to writing and executed by the parties thereto on or prior to October 29, 1890, and that the fair and reasonable value of the franchise therein mentioned granted to said Oconto Water Company by the ordinance therein mentioned was, when such was made, not less than twenty-five thousand dollars.

Sixtieth. That the officers of said company and from the time of making said contract of September 13, 1890, between said company and these defendants endeavored in good faith and so had these defendants to find a purchaser for the one hundred bonds which the said company had by said contract agreed to and which it thereafter did as aforesaid deliver to these defendants in pledge and as collateral security as aforesaid in order, and in accordance with the original plan of said company to obtain the means thereby with which to repay these defendants and finish constructing its said plant, but no purchaser could be found for said bonds, the construction of said company's plant not being advanced to a point sufficiently near completion to give said bonds a market value.

Sixty-first. That in this state of affairs, the said company having exhausted all its funds and having no way of obtaining others or to proceed with the construction of its plant and being unable to make any arrangement whereby said plant could be completed within the time and as required by the terms and conditions of said ordinance No. 153 of said city of Oconto, its officers, viz: the said Garland and F. H. Todd, on the 7th day of January, 1891, invited

the defendant George W. Sturtevant, Jr., who was a man of large experience in the construction and operation of water-works systems and of large acquaintance with people dealing in securities known as "water bonds," being bonds issued by water companies to obtain means for the construction of their plants, to visit the said city of Oconto for the purpose of aiding and assisting an adjustment in some satisfactory manner of the troubles of said company, and the said Sturtevant accordingly and on or about said 7th day of January, 1891, visited said city of Oconto for that purpose and there found the said Garland and the said F. H. Todd and these defendants.

Sixty-second. That at said meeting of said parties these defendants distinctly notified said parties that they, these defendants, would make no arrangement of any kind for putting any more money into said plant or enterprise while the said Garland continued to have any relations with said company, and the said Garland recognizing that, in view of the situation of said company's affairs at that
141 time, any interest which he had in it or of its property was merely nominal, and that his continued connection with the enterprise would serve only to completely obstruct further construction work and thereby result in a forfeiture of the said company's franchise, in order to enable the affairs of said company to be administered by other officers consented to resign as president and as a director of said company and assign all of his interest in the stock subscribed for by him as aforesaid, and give up and surrender all rights or interests claimed by him under any contracts with said company, in consideration whereof these defendants, in view of their interest as secured creditors of said company with securities without value, unless said company's plant should be completed according to the terms and conditions of said ordinance No. 153, with the view of having the affairs of said company under other and more capable management, agreed to and did release the said Garland from all liability as an endorser of the notes given by the Oconto Water Company to these defendants for the forty thousand dollars loaned said company by these defendants as hereinbefore stated; whereupon these defendants and the said Garland mutually agreed that the defendant George W. Sturtevant, Jr., was a proper and fit person, in view of his skill and experience and administrative ability in such affairs, to receive the transfer and assignment of all of the said Garland's interests in said company, its stock and property, and the said George W. Sturtevant consenting thereto, the said Garland on the 12th day of January, 1891, made, executed and delivered to the said George W. Sturtevant a written instrument which, when delivered, was in the following words and figures, to wit:

"OCONTO, *January* 12, 1891.

"Know all men by these presents, that I, C. C. Garland, of Minneapolis, Minn., being the true owner of the following certificates of stock of the Oconto Water Company, a corporation of Wisconsin, viz:

"Certificate No. seven (7) for 300 shares.

"Certificate No. eight (8) for 300 shares.

"Certificate No. nine (9) for 300 shares, and

"Certificate No. ten (10) for 97 shares, seven (7) of the latter, however, being the property of F. H. Todd, all, however, being now pledged to and held by Andrews & Whitcomb, of Norway, Maine, as collateral security, do hereby, for value received, sell, assign, transfer and set over unto George W. Sturtevant, Jr., of Bushnell, Illinois, all of my right, title and interest in and to all of said certificates of stock, and do hereby constitute and appoint the said George W. Sturtevant, Jr., my true and lawful attorney, irrevocable for me and in my name and stead, but to his use, to make and execute all necessary acts of assignment and transfer of said
142 stock on the books of said company, and attorneys, one or more to substitute, with like full power, for the purposes aforesaid, hereby satisfying, ratifying, and confirming all that said attorney, or his substitute or substitutes, shall lawfully do by virtue thereof.

"In witness whereof I, C. C. Garland, have hereunto set my hand and seal this 12th day of January, 1891.

"[SEAL.] C. C. GARLAND."

Signed, sealed and delivered on absence of:
A. C. COBB.
F. H. TODD.

That said arrangement and said instrument were made as aforesaid, all with the knowledge and consent of the said defendant, F. H. Todd.

Sixty-third. That at the same time and under the instructions of the said Garland the said defendant, Matt. S. Wheeler, assigned and transferred the share of stock certificate No. 11 so filled out to the said Wheeler as aforesaid, to this defendant, W. H. Whitcomb, and the said defendant, A. J. Elkins, at the same time and under like instructions assigned and transferred the share of stock certificate No. 12 so filled out to the said Elkins as aforesaid, to the defendant S. W. Ford, and at the same time the said defendant, N. S. Todd, under like instructions assigned and transferred the share of stock certificate No. 13 so as aforesaid filled out to the said N. S. Todd, to this defendant, S. D. Andrews, all with the knowledge and consent of these defendants and of the said defendant, S. W. Ford; and these defendants admit that neither the defendant Sturtevant or the defendant Ford ever paid to the defendant Oconto Water Company any consideration for the stock certificates so as aforesaid assigned to them respectively, and that neither of these defendants paid said Oconto Water Company any new consideration for the two shares of stock so as above set forth assigned to them respectively by the said defendants, Wheeler and N. S. Todd.

Sixty-fourth. That, as to the seven shares of stock subscribed for the said F. H. Todd, which were at the time the said Garland assigned to the said defendant Sturtevant the 997 shares of stock as hereinbefore stated, held by the said Garland for the said F. H. Todd, it was understood and agreed by and between the said Sturte-

vant and the said Garland and the said F. H. Todd that the said Sturtevant should hold the said seven shares under such assignment in the same character and manner as the same had been held up to that time by the said Garland.

Sixty-fifth. That thereafter and on the same day, to wit: on the 12th day of January, 1891, a stockholders' meeting of said company was held at the office of said company in said city of Oconto
143 pursuant to the written consent of all of the stockholders of said company under such assignments of stock as aforesaid, made and signed in the said record book of said company in the following words and figures, to wit:

Stockholders' Meeting, January 12, 1891.

"OCONTO, WIS., *January* 12, 1891—at 10.15 a. m.

"We, the undersigned, being all the stockholders in the Oconto Water Company, each owning the number of shares of stock in said company set opposite our respective signatures hereto, all being now present at the office of said company, in the city of Oconto, Wisconsin, do hereby expressly consent to the holding of a meeting of the stockholders of said company at this time and place.

"GEO. W. STURTEVANT, JR., 990 shares.
"F. H. TODD, 7 shares.
"S. W. FORD, 1 share.
"W. H. WHITCOMB, 1 share.
"S. D. ANDREWS, 1 share."

That at such meeting certain proceedings were had which *was*, as shown by the record thereof upon the record book of said company, *which was* and *is* in the following words and figures, to wit:

"OCONTO, WIS., *January* 12, 1891.

"Pursuant to the foregoing written consent signed by all the stockholders of the Oconto Water Company and pursuant to notice thereof, heretofore given to each and all of said stockholders, a special meeting of the stockholders of said company was held at the office of said company in the city and county of Oconto, in the State of Wisconsin, on the 12th day of January, 1891, at 11.30 a. m., for the purpose of acting upon the resignations of Charles C. Garland as its president and one of its directors, and F. H. Todd, as its secretary and treasurer.

"Present: George W. Sturtevant, Jr., representing 990 shares; F. H. Todd, representing seven shares; S. W. Ford, representing one share; W. H. Whitcomb, representing one share, and S. D. Andrews, one share of the capital stock of said company.

"The meeting was called to order by Mr. Geo. W. Sturtevant, Jr., and the following business was transacted:

"Moved that Geo. W. Sturtevant, Jr., act as chairman *pro tem.*

"Carried.

"Moved that S. D. Andrews act as secretary *pro tem.*

"Carried.

144 "The secretary *pro tem.* then read the following resignations:

"'OCONTO, *January* 12, 1891.

"'To the Oconto Water Company and its board of directors.

"'GENTLEMEN: I hereby tender my resignation as a director of the Oconto Water Company and as its president, and request that the same may be acted upon and accepted at once.

"'(Signed) CHARLES C. GARLAND.'

"Also read the resignation of F. H. Todd:

"'OCONTO, WIS., *January* 12, 1891.

"'Oconto Water Company, Oconto county, Wisconsin.

"'GENTLEMEN: I hereby tender my resignation as secretary and treasurer of the Oconto Water Company, and request that the same be acted upon and accepted at once.

"'Yours respectfully,

"'(Signed) F. H. TODD.'

"Also read the resignation of N. S. Todd as follows, to wit:

"'OCONTO, WIS., *January* 12, 1891.

"'Oconto Water Company, Oconto county, Wisconsin.

"'GENTLEMEN: I hereby tender my resignation as a director of the Oconto Water Company, and request that the same be acted upon and accepted at once.

"'Yours respectfully,

"'(Signed) N. S. TODD.'

"Moved that said resignations of Charles C. Garland, F. H. Todd, and N. S. Todd, and each of them, be accepted.

"Carried.

"Moved that we proceed to the election of two directors to fill the vacancies caused by the resignation of N. S. Todd and Charles C. Garland.

145 "Carried.

"Mr. Andrews acted as teller.

"Mr. George W. Sturtevant, Jr., was then placed in nomination as one of the directors of the Oconto Water Company, and the votes of all the stockholders present being cast for him he was declared elected as one of the directors of said company.

"Mr. S. W. Ford was then nominated for director of the Oconto Water Company, and the votes of all the stockholders present being cast for him he was declared elected as director of said company. No further business appearing before the meeting it was moved that the meeting adjourn.

"Carried.

"S. D. ANDREWS,
"Secretary pro Tem."

Sixty-sixth. That immediately following the adjournment of said stockholders' meeting a directors' meeting of said company was held

at the same place pursuant to the written consent of all of the directors thereof, made and signed upon said record book of said company in the following words and figures, to wit:

Directors' Meeting, January 12, 1891.

"OCONTO, WIS., *January* 12, 1891.

"We, the undersigned, being all of the directors of the Oconto Water Company, and being all now present at the office of said company, at the city of Oconto, and State of Wisconsin, do hereby expressly consent to the holding of a meeting of the board of directors of said company at this time and place.

"GEO. W. STURTEVANT, JR.
"S. W. FORD.
"F. H. TODD."

That at said directors' meeting certain proceedings were had which were, as shown by the record thereof kept upon said record book of said company, as follows:

"OCONTO, WISCONSIN, *January* 12, 1891.

"Pursuant to the foregoing written consent signed by all the directors of the Oconto Water Company, and pursuant to notice thereof heretofore duly given to each and all of said board of directors, a special meeting of the board of directors of said company was
146 held at the office of said company in the city and county of Oconto, in the State of Wisconsin, on the 12th day of January, 1891, at 1.30 p. m., for the purpose of electing a president, secretary and treasurer of said company caused by the resignation of Charles C. Garland, as its president, and F. H. Todd, as its secretary and treasurer.

"Present: Geo. W. Sturtevant, Jr., S. W. Ford and F. H. Todd.

"The meeting was called to order by Mr. Geo. W. Sturtevant, Jr., and the following business was then transacted:

"Moved that Mr. Geo. W. Sturtevant, Jr., act as president *pro tem.*

"Carried.

"Moved that S. D. Andrews act as secretary *pro tem.*

"Carried.

"Mr. Geo. W. Sturtevant, Jr., president *pro tem.*, then took the chair and called the meeting to order.

"Mr. S. D. Andrews acting as secretary *pro tem.*

"Mr. Geo. W. Sturtevant, Jr., was then placed in nomination for president of the Oconto Water Company, and the votes of all the directors present being cast for him he was declared duly elected to said office.

"Mr. S. D. Andrews was then placed in nomination for secretary of the Oconto Water Company, and the votes of all the directors present being cast for him he was declared elected to said office.

"Mr. S. D. Andrews was then placed in nomination for treasurer of the Oconto Water Company, and the votes of all the directors present being cast for him he was declared elected to said office.

"Moved that the meeting adjourn.
"Carried.

"S. D. ANDREWS,
"*Secretary pro Tem.*"

Sixty-seventh. That at once after such election of a new board of directors of said defendant company as aforesaid, these defendants, being then fully advised of the indebtedness of the said company to various parties, amongst others the complainant in this suit, with the view of making some joint arrangement with said company's creditors for the completion of said company's plant, or if terms could be agreed upon therefor of disposing of their entire interest in said plant to such creditors, invited all of the creditors of said company who have up to the present time brought suit upon
147 their respective claims against said company and whose claims constituted, with the claims of these defendants, the entire indebtedness of said company, with the exception — claims not exceeding two or three thousand dollars in all, to meet these defendants at some convenient place to conclude some arrangement or arrangements for that purpose, and thereupon such creditors, and amongst others the complainant in this suit, which is the only one of the creditors of said company whose claim has ever been put into judgment against said company, except Chapman Valve Manufacturing Company, which has obtained judgment against — company for the sum of $— damages and costs, met these defendants and the president of said company, viz: the defendant George W. Sturtevant, Jr., at the city of Chicago, in the State of Illinois, which meeting took place on or about the 14th day of January, 1891. That there *was* represented at such meeting as aforesaid all of the holders of said company's indebtedness, except of the few small claims above referred to not exceeding in amou*n*t two or three thousand dollars. That with the exception of these defendants no creditor of the said company ever at any time had any collateral security of any kind for the payment of any part of his or its claim or claims against said company. That at the time of such meeting of said company's creditors at Chicago as aforesaid these defendants were the first mortgagees of said company's franchise obtained from said city of Oconto under and in virtue of the provisions of said city's ordinance No. 153, and were the pledge-s in possession of its entire capital stock and of one hundred thousand dollars of its first-mortgage bonds secured by the trust deed upon its property hereinbefore mentioned. That at such meeting of creditors these defendants in good faith offered the other creditors of said company there represented, or any one or more of them who would accept the proposition, to assign, transfer and turn over to them or any of them the entire claim of these defendants against said company and their securities, such claim then amounting to $45,000 besides the unpaid interest on the notes given these defendants as aforesaid by said company for the sum of $30,000, and stood ready, willing and anxious to execute such proposition if the same was accepted. That said creditors and all of them declined to accept said proposition or to entertain it. That these defendants

thereupon proposed to said creditors there represented that they, with these defendants, proceed to jointly finish the construction of said company's water-works system or plant in said city of Oconto according to the terms and conditions of said ordinance No. 153, and pay the debts not represented at such meeting, upon the following
148 terms and conditions, that is to say, each of said creditors, together with these defendants, to contribute its, his or their proportionate share of the amount necessary therefore on the basis and relatively according to their respective claims against said company at that time, and these defendants proposed, in connection therewith, and offered and stood ready and willing, in case said other creditors accepted said proposition for the completion of said company's plant, to share all of the securities then held by these defendants as collateral to their claims against said company with said creditors in common, not only as to such further funds as each of said creditors under such arrangement if it was accepted, should contribute to the completion of said plant, but as to the indebtedness then existing at the time of such meeting of said company to each of said creditors, the intent and purpose of said proposition being that these defendants and all of the other creditors represented at such meeting should hold and own all of the securities then held by these defendants in common and without any priority of right in any one of them as security for such indebtedness as then existed from said company to each of them and for such further sums as each of them should have to contribute to complete said plant and pay such unrepresented indebtedness in case said creditors accepted said proposition of these defendants for the completion thereof as above stated, and these defendants stood ready and willing and anxious to make their own contribution to such further cost of the completion of said plant and payment of such indebtedness on the basis of such proposition and to share their securities with the other creditors to the full extent contemplated by such proposition if the same was accepted. That each and all of said creditors, the complainant in this suit with the rest, declined to accept such proposition, and declined as well to make any arrangement or come to any accom-odation with reference to their several claims against said company on any other basis than the full payment of their respective claims. That the directors and stockholders of said company also stood ready and willing to adopt all measures and take all steps necessary to the carrying out and consummation of said proposition of these defendants to said creditors looking to the completion of said plant at their joint cost, and to do and perform any and all things required of said company by its said creditors, or deemed advisable by them in case the plan proposed by these defendants for the completion of said plant aforesaid should have been assented to and adopted by said creditors, and it was made at such meeting to appear to said creditors that it was necessary in order
149 to save a forfeiture of said company's franchise granted by said ordinance No. 153, that its said plant should be completed according to the terms and conditions of said franchise on or before the 1st day of February, 1891; but said creditors, and all of

the same, nevertheless declined and refused to participate in any way in the labor or expense of completing said plant, and constantly insisted upon full payment of their respective claims against said company, knowing at the same time that said company had no funds whatever and no property, save its unfinished plant and its franchises, stock and bonds mortgaged and pledged to these defendants as aforesaid. That in this state of affairs said company, being without means with which to finish its plant and save a forfeiture of its franchise by lapse of time, the property of said company and its franchise had only a nominal value, and the securities held by these defendants as collateral to their claim against said company were valueless and could only be augmented in value by the completion of said company's plant on or before February 1, 1891, unless the time therefor was extended by said city, and not then or at any time, unless a sufficient supply of wholesome water for domestic purposes could be found and furnished the inhabitants of said city by said company in connection with its plant, and these defendants, upon the refusal of said other creditors to join them in completing said company's plant as above stated, found themselves obliged, in order to give any value to their said securities, to assume the entire expense of completing said plant and the risk of finding a sufficient supply of wholesome water for domestic purposes for the use of the inhabitants of said city, without finding and obtaining which said plant, completed in all other respects according to the terms of said ordinance No. 153 and acceptable to said city of Oconto, would not be accepted by said city, in which event said plant would be practically valueless, as no revenues whatever could be obtained from its maintenance and operation. That the well or reservoir constructed by said company as a part of its plant, and which said company originally relied upon to furnish water in sufficient quantities and of a good and wholesome character to answer all of the requirements and conditions of said ordinance No. 153 in that behalf, failed, when constructed, to provide or furnish water fit for domestic purposes, it being neither good or wholesome, and said company was obliged to rely upon other means and sources for such water. That after refusal of the other creditors of said company to assist in any way or manner in completing said plant, said city of Oconto was induced on or about January 17, 1891, solely by the personal efforts of
150 these defendants to extend the time for the completion of said plant until May 1, 1891, after the granting of which extension of time these defendants promised and agreed with the officers of said company that they would, upon certain terms and conditions, which are expressed in "Exhibit G," hereto attached and hereinafter referred to, to furnish further funds to said company for the completion of its said plant and to enable said company to perform all of the conditions of said ordinance No. 153, so that said city of Oconto would accept said plant as completed under and pursuant to the terms and conditions of said ordinance, and thereupon, on the 9th day of March, 1891, the stockholders of said company held a meeting at the office of said company in said city of Oconto, pursuant to the written consent of all of said stockholders, written

in said company's record book and signed by said stockholders on said date, which written consent was in the following words and figures, to wit:

Stockholders' Meeting.

"OCONTO, WIS., *March* 9, 1891—2 o'clock p. m.

"We, the undersigned, being all of the stockholders of the Oconto Water Company, and being all now present at the office of said company in the city of Oconto and State of Wisconsin, do hereby expressly consent to the holding of a meeting of the stockholders of said company at this time and place.

"GEORGE W. STURTEVANT, JR., 990 shares.
"F. H. TODD, 7 shares.
"S. W. FORD, 1 share.
"W. H. WHITCOMB, 1 share.
"S. D. ANDREWS,
"By W. H. WEBSTER, *Proxy*, 1 share."

Sixty-eighth. That at such meeting certain proceedings were had, of all of which a record was kept in the record book of said company, which proceedings were as shown by said record, and said record was and is in the following words and figures, to wit:

"In accordance with the foregoing written consent of the stockholders of said Oconto Water Company, a special meeting of the said stockholders was held at the office of said company, in the city of Oconto and State of Wisconsin, on March 9, 1891, at 2 o'clock
151 p. m., for the purpose of giving their consent to the board of directors of said company to borrow money for the purposes of the corporation and no other, upon such terms and conditions as to said board may seem proper and expedient, and for that purpose to mortgage the franchise, tolls, revenues and property, both real and personal, of said company, to secure the payment of money so borrowed.

"Present, Stockholders Sturtevant, Todd, Ford, Whitcomb and Andrews, by W. H. Webster, his proxy.

"The following proceedings were had, to wit:

"On motion F. H. Todd was appointed secretary *pro tem.*

"On motion S. W. Ford was appointed chairman to preside over this meeting.

"The following resolution was then adopted by the unanimous vote of the stockholders, viz:

"'Resolved, That the board of directors of the Oconto Water Company be, and the said board is hereby authorized and empowered upon such terms and conditions as to said board may seem proper and expedient to borrow a sum of money not to exceed twenty thousand ($20,000) dollars for the purposes of the corporation and no other, and for that purpose to mortgage or pledge the franchises, tolls, revenues and property, both real and personal, of the Oconto Water Company, to secure payment of the money so borrowed, provided the money can be borrowed from Andrews & Whitcomb. The said Andrews & Whitcomb having already ad-

vanced to this company various sums of money approximating the amount forty-five hundred ($4,500) dollars in addition to their loan made to the company under their contract of September 13, 1890, with the company for which they had no security, all such sums may be considered a part of the new loan hereby authorized to be made of the said Andrews & Whitcomb and secured as above provided for, the same having all been used for the purposes of the company.'

"On motion the meeting was then adjourned.

"Attest:

"F. H. TODD,

"*Secretary pro tem., Oconto Water Company.*"

Sixty-ninth. That immediately following the adjournment of said stockholders' meeting a directors' meeting of said company was held, at which all of the directors of said company were present, at which directors' meeting certain proceedings were had of which a record was kept in the record book of said company, which
152 proceedings were as shown by said record, and said record is in the following words and figures, to wit:

Directors' Meeting.

"OCONTO, WISCONSIN, *March* 9, 1891—3 o'clock p. m.

"Directors present, Sturtevant, Ford and Todd.

"The following resolution was offered by Mr. Ford, seconded by Mr. Todd and unanimously adopted, viz:

"'Whereas, various sums of money in addition to the amount agreed by them to be furnished and furnished the Oconto Water Company by Andrews & Whitcomb under their contract dated September 13, 1890, with the said company, approximating the sum of forty-five hundred ($4,500) dollars, have been furnished the said company by the said Andrews & Whitcomb, or procured by them to be furnished the said company prior to this date; and,

"'Whereas, more money is needed by the said company to enable it to carry on to completion the work of construction of its plant and to put the same in working order, and the said company having no funds with which to repay the said Andrews & Whitcomb the additional sums above mentioned so by them advanced as above stated, and the said Andrews & Whitcomb having no security for the repayment of such sum of money, and being willing in consideration of being secured the repayment of such additional sums and interest to make further advances or loans of money to said company in consideration of being secured the repayment thereof and interest, and the said Andrews & Whitcomb for such security being willing to take a second mortgage of the franchise of said company now held by them as collateral to a loan made by them to said company under said contract of September 13, 1890, and a mortgage upon the tolls, revenues and property, both real and personal, of said company, now thereupon be it

"'Resolved, That a sum of money which, taken with the addi-

tional sums already advanced or procured to be advanced by the said Andrews & Whitcomb to the Oconto Water Company as above stated, shall not exceed the sum of twenty thousand dollars, or so much thereof as they may be willing to loan, be borrowed from the said Andrews & Whitcomb by the said Oconto Water Company for the period of sixty (60) days from the date of the execution of a contract between said parties therefor, at the annual rate of seven per cent. interest, the company's note or notes to be given as desired by the said Andrews & Whitcomb, to be signed by the president and countersigned by the secretary of said company, payable to
153 the order of Andrews & Whitcomb and payment thereof to be secured by a second mortgage or assignment of all rights, privileges, immunities, franchises and powers of whatsoever name or nature of the said Oconto Water Company, and a second pledge of the bonds and stock of said company now held in pledge by the said Andrews & Whitcomb as collateral to the loan made by them to said company under the said contract of September 13, 1890, and by a mortgage upon all tolls, revenues and property, both real and personal, of the Oconto Water Company.

"'The president of the company is hereby authorized to make and sign on behalf of the company contracts and papers necessary to carry into effect and accomplish the purpose of this resolution and the same, when countersigned by the secretary of this company and sealed with its seal, shall be the contract of this company.'

"On motion the meeting was then adjourned until 3 o'clock p. m. of Thursday, March 12, 1891.

"Attest: F. H. TODD,

"*Secretary Oconto Water Company pro Tem.*"

Seventieth. That thereafter and on the 13th day of March, 1891, the said defendant company and these defendants made and entered into a contract in writing in the words and figures of "Exhibit G" hereto attached, which is here referred to and hereby made a part of this answer.

Seventy-first. That the various sums of money advanced or procured to be advanced said company by these defendants prior to the making of said contract of March 13, 1891, above mentioned, being the original of said "Exhibit G," in addition to those provided for and furnished under said contract of September 13, 1890, the original of "Exhibit A" of this answer, being the sums referred to in said contract, the original of said "Exhibit G," as having been so advanced by these defendants to said company at its request, amounted in all to the sum of $4,439.79 and were so furnished by these defendants at the times and in amounts as follows, to wit: $1,843.17 on the 21st day of January, 1891; $551.55 on the 5th day of February, 1891; $1,395.07 on the 18th day of February, 1891, and $700 on the 11th day of March, 1891, all of which said several sums had been actually used in the further construction of said company's plant and works beyond the point to which said work of construction was carried by the expenditure of the said sum of $40,000 furnished said company by these defendants under said con-

tract of September 13, 1890, the original of "Exhibit A" of this answer.

Seventy-second. That upon the making and execution of said contract of March 13, 1891, the original of said "Exhibit
154 G," the said defendant company on said 13th day of March, 1891, made, executed and delivered its promissory notes bearing date on that day for the several amounts stated and set forth in the last preceding paragraph of this answer, one note for each of said amounts, each note expressing upon its face that the amount therein named should be paid sixty days after the date of said note with interest at the annual rate of seven per cent. from the date when said amount was actually furnished, expressing such date as expressed in the last preceding paragraph of this answer; and also on said 13th day of March, 1891, its promissory note, bearing date that day, for $12,000 payable in sixty days after date with interest at the annual rate of seven per cent.

Seventy-third. That on said 13th day of March, 1891, upon receiving said notes from the said defendant company as aforesaid these defendants provided and furnished the said company with said sum of $12,000, all of which the said company thereafter actually used in and about the purchase of material for its said plant and for carrying on the work of construction thereof towards completion.

Seventy-fourth. That after the expenditure of said sum of $12,000 as above stated by said company its said plant was still unfinished, and it had not succeeded in obtaining any wholesome water to supply the inhabitants of said city of Oconto with for domestic purposes, and in order to complete said plant and obtain such supply of water said company had to have still further means for that purpose, and thereupon on the 16th day of May, 1891, the said company and these defendants made and entered into another contract, which was and is in the words and figures of "Exhibit H" which is hereto attached and is here referred to and hereby made a part of this answer, under and in virtue of the provisions of which contract these defendants actually furnished and loaned the said company, and the said company actually used the same in completing its said plant and obtaining a supply of wholesome water for domestic purposes for the inhabitants of said city of Oconto, the full sum of $8,763.33.

Seventy-fifth. That on the 17th day of June, 1891, all of the notes given these defendants by the said company as hereinbefore stated, having matured and no part of them having been paid and these defendants then being the sole owners and holders of all of said notes and of all of the rights, claims and demands against said company given by said contracts, the originals of "Exhibits A" and "G" of this answer, and of all of the securities given these defendants by said company as collateral to said notes and claims, instituted a suit upon said notes and contracts in the
155 circuit court of Oconto county, State of Wisconsin, against said company, and caused service of the summons and complaint in said suit to be made upon said company on said 17th day

of June, 1891, in which suit these defendants were the sole plaintiffs and the said defendant Oconto Water Company was the sole defendant, and thereafter such proceedings were had in said suit, the said defendant company having made no appearance therein, that on the 13th day of August, 1891, a decree was duly made, rendered and entered therein by said court in favor of the plaintiffs and against the defendant therein in the words and figures of "Exhibit I" hereto attached, which exhibit is here referred to and made a part of this answer.

Seventy-sixth. That in pursuance of said decree the person named and appointed therein and thereby as a referee to make the sale therein decreed to be made, viz: William K. Smith, Esq., of the city and county of Oconto, Wisconsin, having first given notice of such sale as required in and by said decree, proceeded on the 12th day of September, 1891, at 10 o'clock a. m., at the Oconto national bank in the city and county of Oconto, Wisconsin, said time and place, being the time and place mentioned and declared in the notice so given by him as aforesaid of such sale, to make sale at public auction of all of the property mentioned and described in said decree and in and by said decree directed and ordered to be sold by him for the purpose of making the amount of the judgment recovered by the plaintiffs in said action against the defendant therein.

Seventy-seventh. That before making sale of said property at the time and place aforesaid the said referee publicly read in the presence and hearing of all persons present on that occasion a duly certified copy of said decree, and then publicly offered to receive bids for any part of the said property so decreed to be sold as aforesaid, at which point in said proceedings and before any bids were made for said property, the complainants in this action being present in the person of a representative and duly authorized agent, interrupted further progress of said sale by publicly and in the presence and hearing of all persons present at the time and place of said sale, several persons being present thereat, a notice in writing in the following words and figures, that is to say:

"*Notice.*

"The National Foundry and Pipe Works, Limited, of Scottdale, Pennsylvania, hereby gives notice to all purchasers, and all others in anywise interested or concerned in the sale of stock, bonds and franchises pursuant to a judgment rendered in the circuit court for
156 Oconto county, in an action wherein S. D. Andrews and W. H. Whitcomb were plaintiffs and The Oconto Water Company defendant, that it is a creditor of the said Oconto Water Company of Oconto, Wisconsin, and claims a lien or other interest in and upon the property of said water company, including the property to be transferred, or in anywise affected by this sale; that it claims an interest in said property so to be sold paramount to the rights of said Andrews & Whitcomb, and that all agreements and contracts sought to be foreclosed in said proceedings were and are null and void as to this creditor; that said proceedings to foreclose or enforce

said agreements were and are null and void, and not binding upon this creditor, and that all purchasers or other persons seeking to acquire any interest in said property by or under this sale, will take subject to the rights and claims of said creditor, the National Foundry and Pipe Works (Limited).

"NATIONAL FOUNDRY AND
PIPE WORKS (LIMITED),
"By MILLER, NOYES & MILLER,
"*Its Attorneys.*"

Seventy-eighth. That after said notice was read as aforesaid the said referee again publicly offered for sale any part of the property so decreed to be sold as aforesaid at such sale. That no bid was made by any person or persons for any separate part of said property; whereupon the said referee then publicly offered to receive bids for all or any part of the property so decreed to be sold as aforesaid. That no bid was made upon such offer by any person or persons except those defendants, who bid the sum of $64,500 for all of said property, and no other bid was made at such sale, and these defendants say that they are informed and verily believe the same to be true that the reading of said notice by the complainants in this action as aforesaid at such sale was the direct cause of no other bids being made at such sale for said property or some part thereof, and that there *was* present at such sale for the purpose of bidding for the property there to be sold under said decree several persons, among others George Beyer of the city and county of Oconto, Wisconsin, and Wallace P. Cook of the same place, both of whom were persons of large financial responsibility, perfectly solvent and well able to pay any bid either of them would make for said property, for the purpose of bidding at said sale for said property, both of whom, as well as all other persons, except these defendants, present at such sale, declined and refused to make any bid for any part of said property at such sale after the reading of said notice as aforesaid. But these defendants do not know and are unable to say what sum or sums were intended to be bid by any other persons at said sale for all or any part of said property.

Seventy-ninth. That thereafter and on the 20th day of September, 1891, the said referee duly made his report to said circuit court of Oconto county, State of Wisconsin, of such sale in the
157 words and figures (omitting the several vouchers for expenditures therein referred to and thereto attached) of "Exhibit J" hereto attached, which is here referred to and hereby made a part hereof, and thereafter and on the 29th day of September, 1891, the said circuit court made and caused to be duly entered therein in said suit an order confirming said report of sale in the words and figures of "Exhibit K" hereto attached, which is here referred to and hereby made a part of this answer.

Eightieth. That at once upon receiving from said referee the instrument or bill of sale given them by him upon such sale, being the original of "Exhibit F" attached to his report and referred to therein, these defendants then being in the actual possession of the

entire capital stock of said company and of the one hundred bonds of said company so as aforesaid delivered to them by said company, took actual possession of said company's water-works system or plant in said city of Oconto, and of the whole thereof, and have ever since retained the actual possession of all of said property, claiming to own the same under said referee's sale thereof to them.

Eighty-first. That said water-works system or plant so as aforesaid taken possession of by these defendants after such sale consisted of its pumping station and well from which it obtains the water supplied to said city and its inhabitants, located upon a piece, parcel or tract of land situated in said city of Oconto, the legal title to which is in said city of Oconto with an existing right in said company to acquire the title thereto at any time by paying to said city of Oconto the sum of $1,500.00, and said company's pipe system extending from said tract, piece or parcel of land throughout said city under its streets. That said tract, piece or parcel of land is a necessary and essential part of said water-works system or plant and a necessary appurtenant thereof, and is essential to the use and enjoyment of the franchise under which said company constructed said water-works system.

Eighty-second. That the only other property which said Oconto Water Company owned or possessed or had any interest in at the time these defendants took possession of the water-works system as aforesaid, consisted of a lot of iron pipe as follows: Eight lengths of six-inch pipe, twenty-five lengths of eight-inch pipe, six lengths of ten-inch pipe and seven lengths of twelve-inch pipe, all of which said company owned and was in the actual possession of at said city of Oconto, at the time said contract of May 16, 1891, between said company and these defendants was executed as hereinbefore stated, said contract being the original of "Exhibit H" of this answer, the market value of all of which pipe did not then and does not now exceed $415.00, and these defendants allege that said contract of May 16, 1891, above mentioned being the original of "Exhibit H" of this answer, created a lien in favor of these defendants upon all of said pipe to secure the repayment of all sums advanced and loaned said company by these defendants under and in
158 virtue of the provisions of said last-mentioned contract, no part or any of which sums has ever been paid these defendants and these defendants are now in possession of all of said pipe under said last-mentioned contract.

Eighty-third. These defendants deny that in taking the various liens and securities which they obtained from said defendant, Oconto Water Company as hereinbefore stated, as collateral security for the indebtedness of said company to these defendants created as hereinbefore stated, they did so with any purpose or intention of taking or holding the same or any of the same as a secret lien or as secret liens upon any of said property, and they allege that they took each and all of said securities in good faith and that all of the same that were taken prior to March 13, 1891, were taken by these defendants without any notice or knowledge whatever of any indebtedness of said company to any other person or persons than these

defendants, and in the belief honestly entertained on the part of the officers of said company and these defendants that the bonds of said company pledged to these defendants as aforesaid could be sold at their par value in time to pay said company's full indebtedness to these defendants and fully equip and construct said system of water works within the time and according to the terms and conditions specified in said ordinance No. 153, and they allege that in making the subsequent loans to said company under said contracts of March 13 and May 16, 1891, as hereinbefore stated, they did so in order to give value to their securities and save themselves from suffering the loss of the money they had previously advanced and loaned to said company which had gone into the construction of said plant, and they allege that the said Charles C. Garland was at all times mentioned in the bill of complaint in this action and in this answer wholly and utterly insolvent and financially irresponsible, and that his endorsement of the notes of said company to these defendants given for said sum of $40,000.00, was absolutely no security for the payment of said notes or any of them, which facts these defendants had ascertained and knew prior to releasing the said Garland from all liability as endorser of said notes as hereinbefore stated.

That although the said defendant Oconto Water Company was without any funds or means whatever, except its franchises and unfinished plant, with which to pay any of its debts at the time of the execution of said contracts of March 13 and May 16, 1891, which fact these defendants admit they knew on each of said occasions, yet the unfinished plant of said company together with the fran-
159 chise of said company, had funds been available to said company for the purpose of finishing said plant to meet the requirements of said ordinance No. 153, was at all times subsequent to the 12th day of January, 1891, actually worth a sum largely in excess of the entire indebtedness of said company and the accrued interest thereon, augmented by the amount of funds then needed to so finish said plant, which fact these defendants and the complainant in this action and all of the other creditors of said company at all times well knew.

These defendants admit that on the 19th day of May, 1891, they entered into a contract in writing with the defendant, The Oconto National Bank, of the character stated in the bill of complaint herein in that behalf, and did deliver into the possession of said bank all of said certificates of shares of stock and bonds as collateral security for advances thereafter made them by said bank and that said agreement with said bank was never filed or made matter of record in any way or manner, but these defendants deny that said defendant, Oconto National Bank, now claims or at the time of the commencement of this suit claimed to hold or have in its possession said franchises, certificates of stock and bonds or any of the same, all of the same having been given up by said bank prior to the commencement of this action.

That the only creditors of the defendant Oconto Water Company who have never instituted any suit against said company are these complainants, who obtained judgment against said company as

stated in the bill of complaint herein and above admitted and R. D. Wood & Company, whose claim, not including interest, amounts to $3,137.56, which is not yet in judgment, and Chapman Valve Manufacturing Company, whose claim, not including interest, amounted to $727.05, which claim is now in judgment. That the balance of the indebtedness of said company is in various small amounts to several different persons amounting in all, not including interest, to about $2,000.

That neither the complainant in this action or any creditor of said company ever made or attempted to make any examination of the books, files or records of said company prior to delivering to said company the material, the purchase price of which constitutes said company's indebtedness to each of its creditors, or prior to extending such credit to said company; nor did the complainant herein or any creditor of said company at any time prior to the 12th day of January, 1891, make or attempt to make or to have made any examination whatever of the files or records either in the office of the city clerk of said city of Oconto or in the office of the register of deeds of the county of Oconto, in Wisconsin, to see if there
160 was any record of any lien or incumbrance upon any of the property of said company, nor did said complainant or any other creditor of said company ever have any notice or knowledge or any information whatever of or concerning any relation of these defendants to said company prior to the 1st day of January, 1891, and these defendants say that said company's unpaid indebtedness was all contracted and existed long prior to the acquirement of any knowledge by any of the creditors of said company, save these defendants, of the fact that these defendants had ever had any relations whatever or anything whatever to do with said company, and that no credit was ever extended or given said company by any of its creditors upon the faith of any relations which ever existed between said company and these defendants, or with any knowledge whatever that these defendants ever had or claimed any interest whatever in any of the property of said company, and that said company's unpaid indebtedness was all contracted prior to the 1st day of January, 1891.

That neither of these defendants ever voted any of the stock or shares of stock of said company other than that represented by said certificates Nos. 11 and 13, transferred to them as hereinbefore stated.

Eighty-fourth. And these defendants, further answering, allege and charge the fact to be that at the time of the commencement of this action there was pending in the circuit court of the United States for the eastern district of Wisconsin, an action at law wherein the complainant in this action was plaintiff and the defendant Oconto Water Company in this action was defendant and these defendants, S. D. Andrews and W. H. Whitcomb, were garnishees, in which action these complainants, the plaintiffs therein, recovered judgment against said defendant Oconto Water Company above referred to and pleaded in the bill of complaint herein, in which action also issue had been and stood joined between the plaintiff therein and

said garnishees according to the law and the statutes of the State of Wisconsin in such case made and provided, which garnishee issue stood noticed and upon the calendar for trial at the January term, 1892, of said court in which the same was pending, and said garnishee issue is still pending and untried in said court, and these defendants submit to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity as against these defendants or either of them, and these defendants hope they shall have the same benefit of this defense as if they had demurred to the said complainant's bill.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill
161 charged; without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is not true to the knowledge and belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable charges in this behalf most wrongfully sustained.

S. D. ANDREWS,
W. H. WHITCOMB,
By W. H. WEBSTER,
Their Solicitor.

W. H. WEBSTER,
Solicitor for Defendants S. D. Andrews and W. H. Whitcomb.

STATE OF WISCONSIN, } ss:
Milwaukee County, Eastern District of Wisconsin, }

S. D. Andrews, being duly sworn, deposes and says: I am one of the above-named defendants. So much of the foregoing answer as concerns my own acts and deeds, is true to my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

S. D. ANDREWS.

Subscribed and sworn to before me, this 15th day of February, A. D. 1892.

[SEAL.] KATIE R. FARRELL,
Notary Public, Milwaukee County, Wis.

"EXHIBIT A."

Memorandum of agreement made in duplicate and entered into this thirteen-h day of September, A. D. 1890, by and between S. D. Andrews and W. H. Whitcomb of Norway, Maine, as parties of the

first part, and the Oconto Water Company of Oconto, Wisconsin, a corporation duly organized under the laws of Wisconsin, as party of the second part, witnesseth:

That, whereas, the said party of the second part is about to construct a system of water works in and for the said city of Oconto, Wisconsin, and is desirous of securing the necessary money
162 for the carrying on of said work until the construction thereof is so far advanced or completed as to allow the said (company) second party to dispose of the bonds of said company to an advantage to said company, the said parties of the first part hereby agree to furnish money to said second party in a total sum not exceeding forty thousand ($40,000.00) dollars at seven (7) per cent. per annum interest, said money to be furnished by said first parties to the said second party between the thirteenth day of September, A. D. 1890, and the first day of January, A. D. 1891, and in sums as follows:

Five thousand ($5,000.00) dollars on or before the first day of October, 1890, as may be required by said second party and the balance of said required amount not exceeding thirty-five thousand ($35,000.00) dollars to be furnished by said first parties as needed by said second party, on receipt of a note duly executed by said second party and an order for the payment of a draft for the amount of said note, said note and order to be forwarded to said first parties at Norway, Maine, at least two (2) weeks in advance of the date of draft for said amount and in consideration of the faithful performance of the above agreement by the parties of the first part, the said party of the second part hereby agrees to make an immediate transfer, in trust, to said parties of the first part of the Oconto water-works franchise as issued to said Oconto Water Company together with the entire one hundred thousand ($100,000.00) dollars of stock of said Oconto Water Company and further agrees to make an immediate issue of one hundred thousand ($100,000.00) dollars in the first-mortgage bonds of the said Oconto Water Company, the same to be secured by deed of trust on the entire Oconto water works, franchise and all of the rights and privileges of said company in said water-work franchise; said deed of trust to be made to some trust company to be hereafter mutually agreed upon. The aforesaid stock and bonds to be delivered to and held by the said parties of the first part as collateral security for the money to be advanced by the said parties of the first party as hereinbefore provided, and upon the full payment by said second party of all its notes given to said first party together with interest thereon at the rate of seven (7) per cent. per annum until paid and the further sum of five thousand ($5,000.00) dollars to be paid by the said second party to said first party in the final settlement of all accounts between said parties hereto, the said first parties agree to return to said second party all of the stock, bonds and other collateral securities held by said first parties as security for such money so advanced, and it is hereby further agreed by and between the parties hereto that all notes given by said second party to secure money advanced to said first parties shall be made by the Oconto Water Company and endorsed by C. C.

Garland; it is also further agreed between the parties hereto that in case the said works are not completed and accepted by the city of Oconto or the bonds of the aforesaid company sold to ad-
163 vantage on or before January 1, A. D. 1891, the aforesaid notes of the Oconto Water Company shall be renewed or payment extended for sixty days or less from January 1, 1891.

S. D. ANDREWS.
W. H. WHITCOMB.
OCONTO WATER COMPANY.
[CORPORATE SEAL.] C. C. GARLAND, *President.*
F. H. TODD, *Secretary.*

"EXHIBIT B."

Know all men by these presents, that the Oconto Water Company, a corporation duly organized and now existing under and by virtue of the laws of the State of Wisconsin and having a place of business in the city of Oconto in said State, in consideration of the sum of one dollar to it in hand paid by S. D. Andrews and W. H. Whitcomb, both of the town of Norway, in the county of Oxford, and State of Maine, the receipt of which said sum is hereby acknowledged, has sold, assigned, transferred and set over and by these presents does sell, assign, transfer and set over unto the said Andrews & Whitcomb, and unto their heirs and assigns forever, all the rights, privileges, immunities, franchises and powers, of whatsoever name or nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of said city of Oconto and approved by the mayor of said city on the ninth (9th) day of July, A. D. 1890, said ordinance being ordinance No. 153 of said city and being entitled "An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns to construct, operate and maintain water works therein." To have and to hold the said rights, privileges, immunities, franchises and powers, and each and all thereof, unto the said Andrews & Whitcomb, and unto their heirs and assigns forever; and the said Oconto Water Company, for itself and its successors, hereby covenants and agrees to and with the said Andrews & Whitcomb that it has good right and lawful authority to sell, assign, transfer and set over, in the manner aforesaid, all of said rights, privileges, immunities, franchises and powers and that it is the owner and holder of all thereof on the date hereof.

Provided, nevertheless, and this conveyance is upon the express condition, that if the said Oconto Water Company, its successors or assigns, shall well and truly repay or cause to be repaid to said Andrews & Whitcomb, their heirs, executors, administrators or assigns, all sums of money which may be hereafter advanced
164 to said company by said Andrews & Whitcomb under and in accordance with the terms of a certain contract made and entered into by and between said company and said Andrews & Whitcomb, which said contract is in writing and bears date this

thirteenth (13th) day of September, A. D. 1890, and shall well and truly keep and perform its part of said contract, then this instrument, and all the terms hereof, shall be null and void, otherwise of full force and effect; this conveyance or transfer being intended only as security for the prompt and faithful performance by said company of its promises, covenants and agreements as set forth in the contract with said Andrews & Whitcomb hereinabove referred to, and being intended for no other purpose whatsoever.

In testimony whereof, the said Oconto Water Company has caused its corporate seal to be hereunto affixed and these presents to be signed in its behalf by C. C. Garland, its president, and by F. H. Todd, its secretary, all done this thirteenth (13th) day of September, A. D. 1890.

[CORPORATE SEAL.] OCONTO WATER COMPANY,
By C. C. GARLAND, *Its President.*
By F. H. TODD, *Its Secretary.*

Executed in presence of—
A. C. COBB,
As to C. C. G.
D. R. MILLER.

"EXHIBIT C."

Ordinance No. 153.

An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain water works therein.

The mayor and common council of the city of Oconto do ordain:

SECTION I.

That the Oconto Water Company, its successors or assigns, be and are hereby authorized, subject to the limitations herein or by law provided, to construct, own, maintain and operate water works in the city of Oconto; to lay pipes for the carrying and distributing
165 of water in any of the streets, avenues, alleys, lanes, bridges or public grounds of the city as now or may hereafter be laid out to acquire and hold, as by law authorized, any and all real estate, easements and water rights, necessary to that end and purpose, with all necessary and proper buildings, wells, conduits or other means of obtaining water supply, with all necessary machinery and attachments thereto, to supply the city and its inhabitants thereof with good and wholesome water suitable for fire and domestic purposes, and for this purpose may enter upon any street, avenue, alley, lane, stream, bridge or public ground under control of the city; to take up any pavement or sidewalk thereon and make such excavations as may be necessary for the laying of such pipe and attachments; provided, that such use of such ground be made with the least practicable inconvenience to the inhabitants of said city; that

such excavations be guarded by barricades wherever necessary, and lighted at night, and that such sidewalk, pavement or excavation be replaced by and at the expense of the grantee, its successors or assigns, in as good condition as before, as nearly as practicable, and with the least possible delay. Said grantee and its successors or assigns shall assume all risk of accident arising from the construction and operation of such water works, and shall save the city harmless from all damages therefor.

SECTION II.

After a test-well to be constructed by said grantee, its successors or assigns, shall have demonstrated that a sufficient supply of good and wholesome water can be obtained from a circular brick well, not more than fifty (50) feet in diameter, then such a well shall be constructed of first-class material and workmanship; but if said well shall not demonstrate that a supply may be obtained as above mentioned then such other means shall be taken as shall be deemed necessary by said grantee, its successors or assigns; but in any case the water furnished for domestic use shall be good and wholesome.

SECTION III.

The rights and privileges herein granted are to continue for a term or period of thirty (30) years from and after the passage of this ordinance, except as herein provided.

166 SECTION IV.

The water works shall be complete and perfect in all its details. The machinery shall consist of two distinct pumping engines, with suitable attachments, capable of pumping three and one-half million (3,500,000) gallons, (U. S. standard) every twenty-four (24) hours, when running at a piston speed not exceeding one hundred and twenty feet per minute. The pumps shall be arranged so that they may work singly or together, as required.

SECTION V.

There shall not be less than eight (8) miles of cast-iron distribution pipe laid. Said pipes to be laid in such streets, as shown on a map on file in the office of the mayor and of the sizes therein stated as marked "original pipe line of the city of Oconto."

All of the water mains laid on the original pipe line by said grantee, its successors or assigns, shall be of first-class material and of the best quality of cast iron, coated inside and out while hot with Dr. Angus Smith's waterproof varnish, and shall be tested at their place of manufacture before leaving the shop, to withstand a hydrostatic pressure of three hundred (300) pounds to the square inch. Said mains to be laid, except at such points as it is impracticable so to do, with a four and a half ($4\frac{1}{2}$) foot cover between the center of the pipe and the surface of the ground. When so laid and completed the amount of pipe shall be known as "the original pipe system."

SECTION VI.

The grantee, its successors or assigns, shall, within twenty days from the acceptance hereof, commence in good faith the construction thereof, and have the same completed to successful operation on or before February 1, 1891; provided the grantee, its successors or assigns, is granted the right before July 15, 1890. Any delay, however, caused by the elements, malicious interference, inability to obtain material or order of court shall work an extension of time for the loss so occasioned.

SECTION VII.

Before acceptance by the city, said work shall be tested as to their power and capacity.

167 First. From eight (8) separate hydrants, one-half selected by the committee, and one-half selected by the grantees and located in the business or manufacturing part of the city, at one and the same time shall throw from each of said hydrants through one hundred (100) feet of two and one-half inch smooth rubber hose and an inch ring nozzle, a stream of water one hundred (100) feet perpendicularly, or one hundred and thirty (130) feet horizontally, in still air. All hose, nozzles, etc., necessary for such test to be furnished by said city of Oconto. The machinery and distribution pipe system are to be tested to an hydraulic pressure of one hundred and fifty (150) pounds per square inch. If such tests are successfully sustained the rental for fire service begins as herein stipulated, and the said city agrees to furnish said grantee, its successors or assigns, a certificate in duplicate to that effect.

SECTION VIII.

The machinery and buildings shall be of good material and workmanship, so as to be of permanent value. The buildings to be of brick or stone, of neat architectural design, with fireproof roof, and so constructed that additions thereto can be made, when necessary, without impa-ring their use during the time such additions are being made.

Said grantee, its successors or assigns, shall maintain a telephone in the pumping station, and fire-alarm bell that may be connected with any fire-alarm system which is or may hereafter be in use in said city.

SECTION IX.

Before the placing of water mains and pipes upon the streets of said city not having an established grade the grade of said street shall be established by said city, and in the event that said city neglects to establish said grade, and the water mains or pipes on that account have to be relaid, the city shall bear the expense of relaying.

Section X.

The city of Oconto hereby agrees to and does rent from said grantee, its successors and assigns, for the term of thirty years, except as hereinafter provided, not less than eighty (80) nor more than one hundred (100) hydrants, said hydrants to be of approved design, or R. D. Wood & Co. make or of similar design, to be located by the said city and set by the grantees, its successors and assigns, on the aforesaid "original pipe system," and if the city shall at any
168 future time elect to place more hydrants on the "original pipe system," such hydrants shall be placed by the grantee, its successors or assigns, at the expense of the city, but the city shall pay no rent therefor.

Upon the pipe system there shall be placed a sufficient number of gates, or valves, so as to permit shutting off the water from portions of the said system without interference with the general supply.

The city at any proper season of the year may require the said grantee, its successor or assigns, to make extension of the pipe system of said works with hydrants set thereon, averaging not more than four hundred (400) feet apart, by giving thirty days' written notice to said grantee, its successors or assigns.

As a condition of making such extensions, the said city agrees to pay rent in semi-annual installments on the first days of January and July each year for each hydrant from the time it is set upon such extensions, at the rate of fifty dollars ($50.00) per annum for the unexpired term of this franchise, except that if said city shall order and locate ten or more hydrants at any one time the rent for each ten (10) or more hydrants shall be forty-five dollars ($45.00) per annum, for the unexpired term of this franchise or contract.

Section XI.

In consideration of this franchise, and as full compensation therefor to the city, said grantee, its successors or assigns, shall during the full term and continuance of this franchise and contract supply water free of charge for the purpose and use of the building or buildings of its fire department, city officers, free public schools, and one display fountain with one-eighth (⅛) inch orifice, located in the cemetery within the city limits, said fountain not to run over six hours per day, six months in the year, and one drinking fountain for man and beast in each ward, to be erected and maintained by the city, properly connected and drained, and of a design to be mutually agreed upon. All water supplied free to be through self-closing fixtures. The city shall have the right to use water from all public hydrants during the full term of this franchise and contract, for the purpose of extinguishing fires, and also for flushing public sewers and gutters, whenever the said city shall deem it necessary for sanitary purposes, upon giving notice to the said grantee, its successors and assigns, at the pumping station, of said flushing to be done by the city. But

there shall not be more than two hydrants open at any
169 one time for such purposes, and no one hydrant shall be opened oftener than twice a week, and not longer than twenty minutes at one time for such purpose. And there shall be no flushing at the time of fire. The fire department once a month may use the hydrants for practice purposes and require grantee, its successors or assigns, to maintain fire pressure not exceeding two hours at each drill. The city shall use the water as provided in all of above cases in a reasonable manner and without unnecessary waste.

SECTION XII.

The city of Oconto hereby agrees to use said hydrants for the extinguishment of fires only, except when used as otherwise provided for, and to make good to the said grantee, its successors or assigns any injury which may happen to any of said hydrants when caused by the carelessness or neglect of city officers or employés, and hereby agrees and promises to pay an annual rental of six thousand five hundred ($6,500.00) dollars for the furnishing of water as herein specified to all public fire-hydrants located on the aforesaid "original pipe system" for the term of thirty years, or such part of said thirty years as said water works shall be operated under this ordinance, which rental the city of Oconto agrees to pay at the office of its city treasurer in semi-annual installments of three thousand two hundred and fifty dollars ($3,250) each on the first days of January and July of each year, or such portions thereof as may be due at such times during said term to the said grantee, its successors or assigns, as hereinbefore mentioned; provided, however, that all forfeitures under this ordinance which may be due to the said city at the times specified for the payment of any hydrant rental, shall be deducted from the amount of such payment.

SECTION XIII.

A sufficient tax shall be levied and collected annually upon all taxable property in the city of Oconto, Wisconsin, subject by laws to such tax, to meet the payments under this ordinance, when, and as they may respectively mature, during the existence of this contract for hydrant rental, which tax shall be irrepealable from and after the passage of this ordinance; and in case the city shall be
authorized to levy a special tax for such purposes, such tax
170 shall be levied annually, and the proceeds thereof shall be kept as a separate fund to be known as the "fire-hydrant fund," and shall be irrevocable and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed except that any excess of said tax in any year over the amount necessary to pay rental for said year may be used for any other purpose that the common council shall direct.

SECTION XIV.

Said grantee, its successors or assigns, shall constantly, day and night, except in case of an unavoidable accident, maintain an aver-

age pressure of forty pounds to the square inch for domestic purposes, and keep all the hydrants supplied with water, and upon receiving fire alarm shall at once furnish sufficient pressure for fire service, up to one hundred and forty pounds, if called for by proper authorities, and shall keep all hydrants in good order and efficient for all such purposes. The chief of the fire department of said city and in case of his absence, the officer in charge thereof, shall inspect such hydrants from time to time, and if upon inspection any of said hydrants are found to be out of working order, or not supplied with water, he shall forthwith notify the chief officers in charge of the water works in writing, specifying the hydrant or hydrants out of working order, or not supplied with water, and said officer of the water works shall forthwith have such hydrant or hydrants put in working order and supplied with water, and if not in working order and supplied with water within five (5) days after such notice, the grantee, its successors or assigns, shall pay to the city a forfeit of ten dollars ($10.00) per week or portion thereof, for every hydrant not in working order and supplied with water, while such hydrants remain out of repair.

SECTION XV.

The city of Oconto, on request of said grantee, its successors or assigns, shall adopt and keep in force an ordinance protecting said grantee, its successors or assigns, in the safe and unmolested enjoyment of the franchise hereby granted, from waste of water by consumers, and also to carry into effect the provisions of said ordinance and the contract thereunder entered into.

171 Said grantee, its successors or assigns, shall have power to make, adopt and enforce regulations not inconsistent with the law for the convenience and security of said grantee, its successors or assigns, as well as that of the public in the operation of said mains and may enforce such regulations by cutting off the supply of water or otherwise; and shall have the right at all seasonable hours of the day to have access to the water pipes and meters of any water-takers, to protect themselves against abuse, fraud and repair, observe or remove the same; and may require all water-takers to sign a contract to observe all reasonable regulations as a consideration for furnishing water.

SECTION XVI.

Said grantee, its successors or assigns, shall not charge consumers, during the continuance of the franchise granted by this ordinance, to exceed the following annual rates, collectible quarterly in advance, except sprinkling rates, which shall be paid in advance for the season, and the said grantee, its successors or assigns, shall have the right at will to supply consumers at the meter rates, instead of at schedule rates.

The grantee, its successors or assigns, shall have the exclusive right of tapping mains, but shall not charge for that service to exceed a reasonable sum.

The connections between the main and the consumer shall be

made at the expense of the consumer; and the lowest annual rate to any one consumer in any one case shall be five dollars ($5).

SECTION XVII.

In consideration of the benefits which will be derived by the said city and its inhabitants from the construction and operation of the said water works, and in further consideration of the water supply thereby secured for public use, and as an inducement for the grantee, its successors or assigns, to enter upon the construction of the said works, the franchise and license hereby granted shall remain in full force and effect for a term of thirty years, subject, however, to a prior termination by the rights of purchase made and in this ordinance provided, and for the same consideration and the same inducements, the city of Oconto hereby rents of the said grantee, its successors or assigns, for the uses herein mentioned, the hydrants hereinbefore described, for and during the term of thirty years from and
172 after the completion of said works, unless said term shall be sooner terminated, as herein provided.

SECTION XVIII.

The city of Oconto, Wisconsin, reserves the right at the expiration of ten years or any term of five years thereafter to purchase the water works of the grantee, its successors or assigns, together with their extensions, rights and privileges and franchise and upon giving the grantee, its successors or assigns six months' notice thereof in writing. The valuation to be determined by three hydraulic engineers, not residents of the city of Oconto, nor in the employ or interest of said city or said grantee, its successors or assigns; the city council choosing one, the grantee, its successors or assigns, one, and the third by these two. Should these two fail to agree on the third, the judge of the circuit court for the county of Oconto may appoint said third engineer, on a written request from the mayor of the said city of Oconto; the valuation of the works to be determined by these commissioners, or if they fail to agree, the majority of them shall define the sum to be paid by the said city to the grantee, its successors or assigns, as the actual value of said water works, and of the rights and privileges hereinbefore granted by the said city to the said grantee, its successors or assigns, including all lands, improvements, buildings and machinery or other appliances constituting said water works, and said commissioners shall make their award in writing in duplicate, and shall deliver one duplicate to said grantee, its successors or assigns, and shall deliver the other to the city clerk of said city within ten days after the same is made, which appraisement shall be binding upon both parties as to the value thereof at the time of said appraisement; and the said city shall have the right to purchase within sixty days thereafter the said water works and all property, rights and appurtenances connected therewith at the price so fixed, and to become sole owner of said works upon payment of the amount fixed by the said commissioners; and should the city decide not to purchase the works then appraised

the expense of the appraisement shall be borne by the city, and the contract between the city and the grantee shall continue in force.

SECTION XIX.

In the event that the said grantee, its successors or assigns, shall issue mortgage bonds, secured by mortgage or deed of trust,
173 upon said water works, franchise, rentals, rights and privileges they may secure the payment of so much of the interest on said bonds as the amount to become due to said grantee, its successors or assigns, under the contract will pay by a standing order on the city filed with the city clerk, executed and acknowledged the same as a conveyance of real estate, requiring the city to pay to the trustee or trustees on such bonds, for the interest on said bonds, the amount specified in said order at the time, when by the terms of this contract such amounts become due and payable to said grantee, its successors or assigns. Such order shall remain in full force and effect, and be complied with by the city until such time as the trustee or trustees of such bonds shall file with the city clerk his or their assent, in writing, executed and acknowledged in the same manner as said order, that said order be revoked. Provided, however, that the city shall not, at any time, be liable to pay or pay to such trustee or trustees any amount greater than the amount then actually due by the terms of this contract to said grantee, its successors or assigns. And the mayor and city clerk are hereby authorized and instructed to sign a certificate as to the provisions of this contract, and to affix the seal of said city to said certificate. All payments made to said trustee or trustees shall be made exclusively to pay interest on such bonds so long as the same shall remain due and unpaid, and any surplus not so payable, and the whole after the said bonds shall have been paid by the said grantee, its successors or assigns shall be paid over by the said city to said grantee, its successors or assigns.

SECTION XX.

In the event of the purchase of said works by the said city of Oconto, the said city shall, in case of such purchase, perform all unfinished contracts made by said grantee, its successors or assigns, for furnishing water, and shall assume and pay all debts and obligations of said grantees, its successors or assigns, to an amount not exceeding the amount of the purchase price to be paid by the said city, and all sums so paid shall be in part discharge of said purchase price.

For the purpose of enabling said city to ascertain the amount of debts and obligations so to be paid, said grantee, its successors or assigns, shall make a statement duly executed of all indebtedness of said grantee, its successors or assigns, which statement shall be made and filed in the office of the city clerk within thirty days after notice from said city that it elects to purchase said works pursuant to the award made.

174 SECTION XXI.

Within twenty (20) days after the passage and publication of this ordinance said Oconto Water Company, its successors or assigns, shall file with the city clerk an acceptance of the same, and a good and efficient bond in the penal sum of ten thousand dollars ($10,000) conditioned that it, or its successors or assigns, will within the time herein specified, complete the works as this ordinance requires it so to do. Such bond shall be subject to the approval of the mayor and common council, and when approved the filing of such bond and such acceptance, which shall be duly acknowledged before some officer authorized to administer oaths, shall have the effect of a contract between the city of Oconto and the said grantee, its successors or assigns, and said acceptance of the terms and provisions of this ordinance so signed, sealed and acknowledged by the aforesaid grantee, its successors or assigns, and this ordinance signed by the mayor and city clerk, sealed with the seal of the city and acknowl- by the mayor and city clerk, who are hereby authorized to sign, seal and acknowledge the same, and duly witnessed, shall be considered part of one and the same contract; and when so executed, acknowledged, and witnessed as aforesaid, shall be together recorded in the office of the register of deeds, Oconto county, Wisconsin, as a contract pertaining to the purchase of real estate.

SECTION XXII.

This ordinance shall take effect and be in force from and after its passage and publication.

Adopted this 9th day of July, 1890.

JOHN NOONAN, *Mayor.*

Attest: CHAS. NORTON, *Clerk.*

[Seal of the City of Oconto.]

Signed in presence of—
W. H. WEBSTER.
L. W. BRAZEAU.

175 "EXHIBIT F."

Memorandum of agreement made and entered into this 13th day of September, A. D. 1890, by and between S. D. Andrews, *et als.*, as parties of the first part, and the Oconto Water Company, a corporation duly organized under the laws of the State of Wisconsin, as party of the second part, witnesseth:

That, whereas, the said party of the second part is about to construct a system of water works in and for the said city of Oconto, Wisconsin, and is desirous of securing the necessary money for carrying — said work until the construction thereof is so far advanced or completed as to allow the said second party to dispose of the bonds of said work for full payment of the cost of the same, the said parties of the first part hereby agree to furnish money to said second party in sums not exceeding a total of $40,000, with interest at seven per

cent. per annum between September 13, 1890, and January 1, 1891, and in sums as follows: $5,000.00 on or before October 1, 1890, the balance of said required amount not exceeding $35,000.00 to be furnished as needed by said second party on receipt of a note duly executed by said second party, and an order for the payment of a draft for the amount of said note. Said note and order to be forwarded to said first parties to Norway, Maine, at least two weeks in advance of the date of draft for said amount. And in consideration of the faithful performance of the above agreements by the parties of the first part hereto, the said party of the second part hereby agrees to make immediate transfer in trust to said parties hereto of the Oconto water-works franchise as issued to said Oconto Water Company, together with the entire $100,000.00 of stock of said Oconto Water Company; and further agree to make the immediate issue of $100,000.00 in the first-mortgage bonds of said Oconto Water Company, the same to be secured by deed of trust on the entire Oconto water-works franchise, and all the rights and privileges of said company in said water-works franchise, rights and privileges, said deed of trust to be made to some trust company to be hereafter mutually agreed upon. The aforesaid stock and bonds to be delivered to and held by the said parties of the first part as collateral security for the money to be advanced by the said parties of the first part, as hereinbefore provided. And upon the full payment by said second parties of all notes given by them to said first parties hereto, together with interest thereon at the rate of seven per centum per annum until paid, and the further sum of $5,000.00 to be paid to said first parties by said second parties on the final settlement of all accounts between said parties. The said first parties hereto hereby agree to return to said second parties all the stock, bonds and other collateral securities held by said first parties as security for such money so advanced. It is hereby further agreed by and between the parties hereto that all notes given by said second party to secure money advanced
176 to them by said first parties shall be made by the Oconto Water Company and endorsed by C. C. Garland. It is also further agreed between the parties hereto that in case the said works are not completed and accepted by the city of Oconto, or the aforesaid bonds sold to advantage on or before January 1, 1891, the aforesaid notes of the Oconto Water Company shall be renewed or payment extended for sixty days or less from January 1, 1891.

(Signed) S. D. ANDREWS.
OCONTO WATER COMPANY.
C. C. GARLAND, *President.*

F. H. TODD, *Secretary.*

"EXHIBIT F."

This agreement made and entered into in duplicate this 17th day of September, A. D. 1890, by and between Charles C. Garland, of Minneapolis, Minnesota, as party of the first part, and the Oconto Water Company, a corporation duly organized and now existing under and by virtue of the laws of the State of Wisconsin, and hav-

ing a place of business in the city of Oconto, in the said State of Wisconsin, as party of the second part, witnesseth:

Whereas, the said Oconto Water Company is the grantee in that certain ordinance passed by the common council of said city of Oconto, approved by its mayor on the 9th day of July, 1890, and entitled, "An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and authorizing the Oconto Water Company, its sucessors and assigns, to construct, operate, and maintain water works therein," which said ordinance was secured to said company through the personal efforts and at the personal expense of said Charles C. Garland, and upon the understanding then had between said Garland and said company that said company should pay to said Garland the fair and reasonable value of any franchises or privileges that might be secured by said Garland, and which might be in said ordinance granted; and,

Whereas, the said company is now the owner and holder of all franchises, privileges and immunities in and by said ordinance granted or conferred; and,

Whereas, the said company did on the 13th day of September, 1890, enter into a contract in writing, bearing date on that day, with S. D. Andrews and W. H. Whitcomb, both of Norway, Maine, a true and correct copy of which said contract is hereto attached, marked "Exhibit A" and made a part hereof; and,

177 Whereas, the said company has not sufficient money or credit with which to erect, construct and fully equip the system of water works contemplated in and by said ordinance, in such a manner as to comply with the terms and requirements of said ordinance,

Now, therefore, this agreement witnesseth:

That the said Garland, party of the first part hereto, in consideration of the promises, covenants and agreements hereinafter contained, to be kept and performed by said company, party of the second part hereto, does hereby release and forever discharge the said company, its successors and assigns from all claims, rights or demands based upon the understanding aforesaid, which now exists in his favor against said company for services rendered and expenses incurred by him, and for any other thing in the matter of securing to said company the franchises, privileges and immunities set forth and granted in the ordinance hereinabove referred to, and for the same consideration the said Garland, party of the first part hereto, does hereby promise, covenant and agree to and with the said company, party of the second part hereto, its successors and assigns, that, within the time limited therefore in the ordinance above referred to, he will erect, construct and fully equip the system of water works mentioned in the said ordinance and therein called the "original pipe system," and will put the same in condition for immediate use by said company, and will so erect, construct and equip the said system of water works that it shall conform substantially to all the requirements contained in said ordinance, and so that it will stand all the tests provided for in said ordinance, and will in all things so complete said system as that the said city of

Oconto will accept the same as provided in said ordinance; it being understood that all buildings, reservoirs, etc., necessary to said system of water works shall be erected and constructed by said Garland upon such real estate owned or to be purchased by said company, as shall be convenient and suitable for such purposes, and the said Garland, party of the first part hereto, for the same consideration, hereby assumes and promises and agrees to hold the said company harmless and forever free from any loss or liability which may or might accrue to said company by reason of its carrying out of the conditions upon it imposed, and the promises by it made in said written contract or agreement hereto attached and marked "Exhibit A" in the manner hereinafter agreed to be done by the company.

In consideration of the promises and of the release, covenants and agreements hereinbefore contained, and in full payment
178 therefor, and for the work thereby contemplated, the said company, party of the second part hereto, hereby promises and agrees to and with said Garland, party of the first part hereto, that it will pay the said Garland the sum of one hundred and ninety-nine thousand dollars ($199,000.00) in the manner and at the time following, to wit:

Ninety-nine thousand dollars ($99,000.00) thereof in such sums and at such times, after the due and legal execution and delivery of this contract by the said Garland, the same or any thereof may be called for by said Garland, it being understood that, inasmuch as the said Garland has subscribed for nine hundred and ninety shares of the capital stock of said company, party of the second part hereto, and as a matter of convenience to save the cash payments by said company to said Garland as aforesaid, payment of the whole or of any part of said ninety-nine thousand dollars ($99,000.00) may be made by the issue to said Garland of stock in said company at par, provided that any payments which have been heretofore made by said Garland to said company on account of said stock subscriptions shall be returned to said Garland whenever demanded by him.

One hundred thousand dollars ($100,000.00) thereof to be paid in the bonds of this company in such denomination as said Garland may designate, said bonds to be dated not earlier than August 1, 1890, to be made payable in gold to such trustee as said Garland may designate, or bearer, not later than twenty-five years after date, to bear interest at a rate not to exceed six per cent. per annum, payable in gold, semi-annually, principal and interest payable at such place or places as said Garland may indicate, the total issue of said bonds to be one hundred and twenty-five thousand dollars ($125,000.00) in amount, all of said issue of bonds to be secured by a first mortgage to the said trustee covering all the property of said company, connected with its said system of water works, including a mortgage on and proper assignment to said trustee of all claims and demands which may accrue against said city of Oconto for the rental of hydrants as provided in said ordinance, which said one hundred thousand dollars ($100,000.00) of said issue of bonds shall be delivered by said company to said Garland, all properly certified

by the trustee of said first mortgage as being part of said issue of bonds so secured as aforesaid, at any time upon the request of said Garland, after the due and legal execution and delivery of this contract by the said Garland.

And in consideration of the promises, the said company, party of the second part hereto, does hereby expressly promise and
179 agree to and with the said Garland, party of the first part hereto, that it will, whenever and so often as thereto requested by said Garland, do and perform any act or thing whatsoever, which is required to be by it done or performed in its said contract, "Exhibit A," all of which shall be done for the use and benefit of said Garland, so that he may have and enjoy all the rights which said company would have under said contract, if this agreement had not been made, and said company does hereby authorize and empower the said Garland, in its name, but at its own cost and expense, and as the duly authorized agent of said company, to adopt such measures and institute such proceedings as may at any time become necessary to secure the faithful performance by said Andrews & Whitcomb, of their part of said "Exhibit A," it being understood that said Garland shall substantially carry out and perform all the promises made by said company in said "Exhibit A," and shall at all times be and remain practically in the same position as said company has heretofore occupied so far as said contract, "Exhibit A," is concerned.

In witness whereof, said party of the first part has hereunto set his hand and seal, and said party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed in its behalf by Charles C. Garland, its president, and to be attested by F. H. Todd, its secretary, all done on the day and year first above written.

(Signed) [SEAL.] CHARLES C. GARLAND.
OCONTO WATER COMPANY,
By C. C. GARLAND, *Its President.*

Attest:
(Signed) F. H. TODD,
Its Secretary.

"EXHIBIT G."

This agreement made this 13th day of March, 1891, by and between Andrews & Whitcomb, a copartnership composed of S. D. Andrews and W. H. Whitcomb, both of Norway, Maine, party of the first part, and "Oconto Water Co.," a corporation organized and existing under and in virtue of the laws of Wisconsin, party of the second part, witnesseth: That,

Whereas, the said first party, under a certain contract be-
180 tween them and said second party, of date September 13, 1890, loaned said second party a large amount of money, all of which was obtained by said second party for the purpose of enabling it to construct its plant and system of water works in the city of Oconto, Wisconsin, and was used for that purpose as far as

it would go, but was insufficient in amount to complete the same; and,

Whereas, to secure payment of the loan so made by said first to said second party under said contract of September 13, 1890, as aforesaid, and the faithful and true performance by said second party of its part of said contract, the stock and one hundred thousand dollars in the first-mortgage bonds, par value, of said second party, were pledged and surrendered by said second party to said first party, and all the rights, privileges, limitations, franchises and powers, of whatsoever name or nature, which were granted to said second party in and by a certain ordinance passed by the common council of the city of Oconto, State of Wisconsin, and approved by the mayor of said city on the ninth (9) day of July, A. D. 1890, the same being ordinance No. 153 of said city and entitled, "An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Co., its successors and assigns, to construct, operate and maintain water works therein," were, as additional security for such payment and performance by said second party on said 13th day of September, 1890, in writing, duly sold, assigned, transferred and set over by said second to said first party; and,

Whereas, at the request of said second party, said first party has, from time to time, advanced or procured to be advanced various sums of money to said second party, in addition to those provided for and furnished under said contract of September 13, 1890, all of which have been used in the further construction of said plant and works, and for the payment of no part of which has any security been given to or is now held by any party of the first part; and

Whereas, the said plant and works of said second party are still incomplete and unfinished; and,

Whereas, the said second party is without funds or means with which to go on with its work of construction of said plant and works; and

Whereas, said first party is willing, upon certain conditions, all of which are hereinafter embodied in this contract, to make further advances or loans of money to said second party to enable such work to go on; now, therefore, it is agreed by the parties
181 hereto as follows: By said second party that the securities now held by said first party as collateral to the loan made by said first party to said second party under said contract of September 13, 1890, be held as well by said first party, and they are hereby reinvested in said first party therefor, as security for the payment of all sums heretofore advanced by said first to said second party, in addition to the loan made under said contract of September 13, 1890, and for all sums that may hereafter be advanced or loaned said second by said first party. Said first party's rights under said contract of September 13, 1890, to be in nowise affected by this contract giving further security upon the same collateral for such additional advances made and to be made under this contract for the carrying on the construction of the works, but all rights conferred upon the parties to said contract are to be and remain the same as though

this contract were not made, this agreement being only to provide for advances made and to be made not covered by said agreement of September 13, 1890, and security for their repayment. Said second party also hereby agrees to deliver its promissory note or notes to said first party for all sums so as aforesaid heretofore advanced by said first party in addition to the loan made by said first party under said contract of September 13, 1890, in manner and form desired by said first party, and to pay interest at the annual rate of seven (7) per cent. on the amount of each of such advances from the time it was made until paid. Said second party also agrees to deliver its promissory note or notes to said first party for all such sums as may be hereafter advanced or loaned it by said first party, in manner and form as desired by said first party, and to pay interest on the amount named in each note at the annual rate of seven (7) per cent. from its date until paid. The repayment of all of such advances or loans with interest, whether evidenced by notes of said second party or otherwise, is secured by the securities now held and possessed by said first party as collateral to the loan made under said contract of September 13, 1890. Said second party also agrees that all other property of every kind, now the property of said second party, not yet a part or attached to its said plant or works, shall be, and the same is hereby vested in and made the property of the said first party, but only as additional security, however, for the repayment of all advances additional to those made under said contract of September 13, 1890; also that all personal property hereafter purchased by said second party for its plant or works, whether building material, machinery, pumps or other articles needful to its plant to put it in a completed condition and at work, and to keep it so, shall be purchased in the name of and shall be and remain the property of the said first party, but only as additional security, however, for the repayment of all such advances or loans as are above
referred to as additional to the loan made under said contract
182 of September 13, 1890; the purpose and object of the above
clauses which relate to the personal property of said second party purchased and to be purchased, being (said first party having furnished and advanced the money for the purchase thereof) to save and preserve the same as security for the repayment of the additional advances or loans made and to be made said second by said first party for the purposes of carrying on the construction of said plant and works.

Said second party also agrees to pay said first party the amount, principal and interest, of all such additional advances or loans hereinbefore mentioned, sixty (60) days from date of the execution of this agreement.

In consideration of the foregoing, said first party agrees that, as often as it is mutually agreed between the parties hereto that such purchases and expenditures are necessary and advisable to furnish and pay out money for the purchase of needful material, machinery, pumps or any other article or articles necessary to a prompt and economical completion of said plant and works, and for labor bills for labor performed in the construction thereof and for such other

purposes as may, by the parties hereto, be mutually agreed to be necessary or advisable up to, but in no event beyond the sum of twelve thousand dollars ($12,000.00).

In witness whereof, the parties have hereunto placed their hands and seals the day and year first above written.

[CORPORATE SEAL.] GEO. W. STURTEVANT, JR.,
President Oconto Water Company.

Countersigned:
S. W. FORD, *Secretary.*
ANDREWS & WHITCOMB. [SEAL.]

In presence of—
CHAS. F. STURTEVANT.
H. S. BUNTIN.
B. H. WHITCOMB.

"EXHIBIT H."

This agreement made this 16th day of May, 1891, by and between Andrews & Whitcomb, a copartnership composed of S. D. Andrews and W. H. Whitcomb, both of Norway, Maine, party of the first part, and the Oconto Water Company, a corporation organized and existing under and in virtue of the laws of Wisconsin, party of the second part, witnesseth, that,

183 Whereas, on the 13th day of March, 1891, the parties hereto made and entered into a certain agreement in writing, bearing that date, a copy of which agreement is hereto annexed marked "Exhibit A," and is here referred to and made a part of this contract; and,

Whereas, the said Andrews & Whitcomb, in virtue of said contract of March 13, 1891, has since the date thereof, advanced and loaned to said Oconto Water Company various amounts of money, aggregating a sum in excess of twelve thousand dollars ($12,000); and,

Whereas, further funds are necessary to enable the said Oconto Water Company to comply with all of the terms and conditions of ordinance No. 153 of the city of Oconto, mentioned and referred to in said contract of March 13, 1891, between the parties hereto, by the said Oconto Water Company to be performed; and,

Whereas, the said Oconto Water Company is without the funds or means to enable it to perform all of such terms and conditions; and,

Whereas, the said Andrews & Whitcomb are willing, upon certain conditions, all of which are hereinafter embodied in this contract, to make further advances or loans of money to said Oconto Water Company to enable it to carry on the work of construction of the plant and water-works system mentioned and provided for in the ordinance in the city of Oconto, hereinbefore referred to, so that said Oconto Water Company shall be able to comply with and perform all the terms and conditions of said ordinance by it to be performed and complied with:

Now, therefore, it is agreed by the parties hereto as follows: By the said second party, that the securities now held by said first party as collateral to the loan made by said first to said second party under the contract of September 13, 1890, mentioned and referred to in said contract of March 13, 1891, and also under said contract of March 13, 1891, be held as well by said first party, and said securities are hereby reinvested in said first party therefor as security for the repayment of all sums heretofore advanced or procured to be advanced by said first to said second party in addition to the sum limited in said contract of March 13, 1891, to twelve thousand dollars ($12,000), and for all sums that may hereafter be advanced or loaned said second by said first party. Said first party's rights under said contract of September 13, 1890, and under said contract of March 13, 1891, to be in nowise affected by this contract, giving further security upon the same collateral for such additional
184 advances made and to be made under this contract for carrying on the construction of said water-works plant and system, and all rights conferred upon the parties to said contracts of September 13, 1890, and March 13, 1891, are to be and remain the same as though this contract were not made, this agreement being only to provide for advances made and hereafter to be made by said first to said second party not provided for by said contracts of September 13, 1890, and March 13, 1891, and security for their repayment said second party also hereby agrees to deliver its promissory note or notes to said first party for all sums so as aforesaid heretofore advanced by said first to said second party in addition to the sums provided for in said contracts of September 13, 1890, and March 13, 1891, in manner and form desired by said first party and to pay interest at the annual rate of seven per cent. (7 per cent.) on the amount of each of such advanced from the time it was made until paid. Said second party also agrees to deliver its promissory note or notes to said first party for all such sums as may hereafter be advanced or loaned to it by said first party in manner and form as desired by said first party, and to pay interest on the amount claimed on each note at the annual rate of seven per cent. (7 per cent.) from its date until paid. The repayment of all such sums with interest, whether evidence by notes of said second party or otherwise, is secured by the securities now held and possessed by said first party as collateral to the loan made under said contracts of September 13, 1890, and March 13, 1891. Said second party also agrees that all other property of every kind now the property of said second party not yet a part of or attached to its said plant or works, shall be, and the same is hereby vested in and made the property of the first party, but only as additional security, however, for the repayment of all advances additional to those made under said contracts of September 13, 1890, and March 13, 1891; also that all personal property hereafter furnished by said second party for its plant or works shall be purchased in the name of, and shall be and remain the property of the said first party, but only as additional security, however, for the repayment of the advances or loans last hereinabove referred to; the purpose and object of the above clauses which

relate to the personal property of said second party purchased and to be purchased (said first party having furnished and advanced the money for the purchase thereof) being to save and preserve the same as security for the repayment of the advances or loans made and to be made said second by said first party additional to those mentioned and provided for in said contract of March 13, 1891, and for the purpose of carrying on the construction of said plant and works.

Said second party agrees to pay said first party the amount, principal and interest of all such additional advances or loans last hereinbefore mentioned sixty days from date of the execution of this agreement.

185 In consideration of the foregoing, said first party agrees that, as often as it is mutually agreed between the parties hereto, that purchases, and expenditures for labor, or for any other needful purpose, are necessary or advisable, to furnish and pay out money for the same up to, but not to exceed the sum of fifteen thousand dollars ($15,000).

In witness whereof, the parties have hereunto placed their hands and seals the day and year first above written.

[CORPORATE SEAL.] OCONTO WATER COMPANY,
By G. W. STURTEVANT, *President.*

Countersigned:
S. W. FORD, *Secretary.*
ANDREWS & WHITCOMB. [SEAL.]

In presence of:
GEO. W. STURTEVANT.
NELLIE T. STURTEVANT.

A true copy of the contract of March 13, 1891, was attached, marked "Exhibit A."

"EXHIBIT I."

STATE OF WISCONSIN:

Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
v.
OCONTO WATER COMPANY, Defendant.

At a special term of said court begun and held at the court-house, in the city of Green Bay, Brown county, Wisconsin, on the first Monday, being the 1st day of June, 1891, and on the 13th day of August, 1891, being the 14th day of said term.

Honorable Sam'l D. Hastings, Jr., judge, presiding.

186 The court having made and filed its findings of fact and conclusions of law herein by which it finds for the plaintiffs; now,

Therefore, on motion of W. H. Webster, Esq., attorney for the plaintiffs herein, it is ordered, considered and adjudged by the court now here, as follows:

First. That the plaintiffs recover of and from The Oconto Water Company, the defendant herein, the sum of sixty-three thousand eight hundred and eighty-seven dollars and twenty-three cents ($63,887.23) damages and the further sum of one hundred and fifty-five dollars and twenty cents ($155.20) costs of this suit and said several sums amounting to sixty-four thousand and forty-two dollars and forty-three cents ($64,042.43) are hereby adjudged and declared to be a lien upon the following-described property of the defendant, to wit: upon all the rights, privileges, immunities, franchises and powers of whatsoever name or nature which were granted the said defendant in and by a certain ordinance passed by the common council of the city of Oconto, Wisconsin, and approved by the mayor of said city July 9, 1890, said ordinance being ordinance No. 153 of said city and being entitled, "An ordinance providing for a supply of water to the city of Oconto and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns to construct, operate and maintain water works therein," and upon one hundred thousand dollars ($100,000) in the capital stock of the defendant now held in pledge by the plaintiffs and upon one hundred thousand dollars ($100,000) in the first-mortgage bonds of the said defendant now also held in pledge by the plaintiffs.

It is further ordered, considered and adjudged that unless full payment be made by said defendant upon demand after the rendition of this judgment of said sums above adjudged to the plaintiffs, together with interest thereon from date hereof all of said property, or so much thereof as may be necessary to make the amount herein adjudged to the plaintiffs with interest and costs, be sold at public auction in some public place in the city and county of Oconto, Wisconsin, by William K. Smith, Esq., of said city, who is hereby appointed a referee to make such sale. That before making such sale the said referee give notice thereof by causing such notice to be published at least once in each week for four consecutive weeks prior to making such sale, in the Oconto County Reporter, a newspaper published weekly in said city of Oconto, which notice shall state the time and place, when and where, he will make such sale and describe the property to be sold. That such sale be made subject to all the rights, interests and claims of the plaintiffs in said property held by them under and in virtue of the contract between the plaintiffs and defendant set forth in the complaint herein, bearing date May 16, 1891, and such notice of sale shall so state.

187 It is further ordered, considered and adjudged that in case of sale as above provided for the plaintiffs may bid thereat for any or all of said property, and if their bid be accepted or taken that they have credit thereon to the extent of the full amount hereby recovered by or adjudged to them against the defendant if their bid be so much, if not so much, then to the extent of the amount bid by them.

That such sale when confirmed shall vest in the purchaser or purchasers of all or any of said property thereat, subject to the rights, interests and claims of the plaintiffs under said contracts of date May 16, 1891, none of which shall be impaired by such

sale, the full legal title of the property so purchased free and clear of any and all rights. claims or equity or equities of redemption of the defendant and of any person or persons claiming by, through or under said defendant subsequent to the acquirement by the plaintiffs of their rights, interests and claims under the contracts between them and the defendant set forth in the complaint herein, and the referee shall give the purchaser or purchasers at such sale an instrument or bill of sale in writing in proper form, showing his or their purchase and the terms thereof, and shall report of his doings under such decree to the court for confirmation, or such action as to the court may seem just.

From the proceeds of such sale the said referee shall pay the costs of such sale first, and then the costs and disbursements of this action and the balance to the plaintiffs for their judgment, recovered herein against the plaintiffs to the extent of such judgment, if he have so much, and if there be still a balance he shall pay the same to the defendant.

August 13, 1891.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

Attest: R. L. HALL, *Clerk.*

188 "EXHIBIT J."

STATE OF WISCONSIN:

Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
v.
OCONTO WATER COMPANY, Defendant.

To the circuit court for Oconto county:

In pursuance of a judgment or decree of this court in this action, bearing date this 13th day of August, 1891, the undersigned Wm. K. Smith, referee, to whom the execution thereof was confided, do report:

That, after the rendition of said judgment or decree and on the 13th day of August, 1891, demand was duly made upon Oconto Water Company, defendant in this action, for full payment of the amount adjudged, in and by said judgment, to the plaintiffs in this action for damages and costs, viz: sixty-four thousand and forty-two dollars and forty-three cents ($64,042.43) which demand was refused in whole, no part of said amount being paid, all of which more fully appears by the written demand directed to said Oconto Water Company and to the treasurer of said company and the written acknowledgement of such demand and refusal of payment and the affidavit of W. H. Webster, all hereto attached and marked "Exhibits A and B," respectively and which are here referred to and made a part hereof.

That I then caused notice of the time and place of sale of the

property and effects in and by said judgment or decree ordered to be by me sold in the event of payment not being made of the amount therein adjudged to the plaintiffs, on demand, containing a description of the property to be sold, to be duly published at least once in each week for four successive weeks prior to the time fixed in said notice for making, and prior to the time of making such sale, in the Oconto County Reporter, a newspaper published weekly in the city and county of Oconto, Wisconsin, and the one designated in and by said judgment or decree as the newspaper in which
189 to publish the notice of such sale if a sale was made, which publication began therein on the 14th day of August, 1891, and ended on the 11th day of September, 1891, all of which more fully appears from the affidavit of the publisher of said newspaper, viz: C. S. Hart, with said notice of sale thereto attached, which affidavit and notice are hereto attached marked "Exhibit C," and are here referred to and made a part hereof.

That agreeably to said notice, I did, at the time and place specified in said notice, to wit: on the 12th day of September, 1891, at 10 o'clock a. m. at the Oconto national bank, in the city and county of Oconto, Wisconsin, expose all of the property and effects mentioned and referred to in said judgment or decree and in said notice of sale as the property in case a sale was made, to be sold, for sale by public auction to the highest bidder.

That I then and there, in manner aforesaid, offered all or any part of said property for sale to the highest bidder, and receiving no bid for any part thereof less than the whole, I report that all of said property, to wit:

First. All the rights, privileges, immunities, franchises and powers of whatsoever name or nature which were granted unto the defendant in this action, viz: Oconto Water Company, in and by a certain ordinance passed by the common council of the said city of Oconto and approved by the mayor of said city July 9, 1890; said ordinance being ordinance No. 153 of said city and being entitled "An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate and maintain water works therein."

Second. One hundred thousand dollars ($100,000) in the capital stock of the said Oconto Water Company, and,

Third. One hundred thousand dollars ($100,000) in the first-mortgage bonds of the said Oconto Water Company, was then and there fairly struck off and sold to S. D. Andrews and W. H. Whitcomb, composing the firm of Andrews & Whitcomb, and being the plaintiffs in this action, said firm being the highest bidder therefor, for the sum of sixty-four thousand and five hundred dollars ($64,500) that being the highest sum bid for the same.

And I do further report that, the plaintiffs in this action being the highest bidder for said property at said sale and their bid being accepted and taken and said property struck off and sold to them, I did, pursuant to the terms of said judgment or decree, credit the said plaintiffs upon their said bid and allow in payment

thereof, *pro tanto*, the sum of sixty-four thousand, four hun-
190 dred and sixteen dollars and one cent ($64,416.01) that being the amount recovered by or adjudged to them against the defendant in this action with interest at the annual rate of seven per cent. from the date of the rendition of said judgment or decree, viz: August 13, 1891, to September 12, 1891, the day of such sale. Of the balance of the amount bid by the plaintiffs at such sale as aforesaid I have paid the sum of eleven dollars and eighty cents ($11.80) to the publisher of said newspaper for publishing said notice of sale, as appears from his receipt hereto attached marked "Exhibit D" which is here referred to and made a part hereof, and the sum of one dollar and seventy-five cents I paid to the clerk of this court for a certified copy of said judgment or decree furnished me by him for the purpose of making said sale and I now have in hand the unexpended balance of said sum bid by the plaintiffs as aforesaid at such sale, viz: seventy dollars and forty-four cents ($70.44) the amount of my fees.

The clerk's receipt of said sum of one dollar and seventy-five cents ($1.75) fees, as aforesaid, is hereto attached marked "Exhibit E" and is here referred to and made a part hereof.

I do further report that, pursuant to the terms and provisions of said judgment or decree I have given the said plaintiffs as purchasers of said property at such sale an instrument or bill of sale in writing which, when delivered to them was in the words and figures of "Exhibit F," which is hereto attached and here referred to and made a part hereof.

I do further report that such sale of said property and effects to the plaintiffs as aforesaid was made subject to all the rights, interests and claims of the said plaintiffs in said property, held by them under and in virtue of the contract between them and the defendant in this action, The Oconto Water Company, of date May 16, 1891, and mentioned and referred to in said judgment or decree.

All of which is respectfully submitted.

September 20, 1891.

WM. K. SMITH, *Referee.*

"EXHIBIT F."

"Exhibit F" Referred to in Annexed Referee's Report.

Know all men by these presents, that heretofore, to wit: on the
13th day of August, 1891, judgment was duly made and
191 given in an action in the circuit court for Oconto county, Wisconsin, wherein S. D. Andrews and W. H. Whitcomb were plaintiffs and Oconto Water Company was defendant, in favor of the said plaintiffs and against the said defendant for the sum of sixty-four thousand and forty-two dollars and forty-three cents ($64,042.43) damages and costs, which amount was by said judgment declared to be a lien upon all of the property hereinafter described, and in the event of default being made by Oconto Water Company, the defendant in this action, in the full payment of the

amount of said judgment upon demand being made therefor, provision was, in and by said judgment, made for the sale of said property, or so much thereof as might be necessary to make the amount adjudged therein to the plaintiffs, with interest and costs, for the purpose of realizing said amount, and demand having been duly made after the rendition of said judgment, upon the said defendant Oconto Water Company, for the payment in full of said amount, and default having been made in full on the part of said defendant Oconto Water Company, upon said demand for such payment, and the undersigned, having been in and by said judgment appointed and made a referee to execute the same in case a sale of said property thereunder became necessary in order to realize the amount of said judgment, and a sale of said property having been this day duly made by me pursuant to said judgment to S. D. Andrews and W. H. Whitcomb, the plaintiffs in said action, for the sum of sixty-four thousand and five hundred dollars ($64,500), the said S. D. Andrews and W. H. Whitcomb having been the highest bidders therefor, at such sale, subject, however, to the rights, interests and claims of the said S. D. Andrews and W. H. Whitcomb in and to all of said property under and in virtue of the contract between them, as one party thereto, and the said Oconto Water Company, as the other party thereto, bearing date May 16, 1891, mentioned and referred to in said judgment; now,

Therefore, in consideration of the premises and of the powers in me vested by said judgment and the law in such case made and provided, I, William K. Smith, in my capacity as referee as aforesaid, and in consideration of the sum of sixty-four thousand and five hundred dollars ($64,500), the amount bid by the said S. D. Andrews and W. H. Whitcomb for said property upon such sale, do hereby grant, bargain, sell, assign and set over and convey unto the said S. D. Andrews and W. H. Whitcomb, their heirs and assigns, subject, however, to the rights, interests and claims of the said S. D. Andrews and W. H. Whitcomb therein under and in virtue of said contract of May 16, 1891, hereinbefore referred to, all of the following-described property, to wit:

192 First. All the rights, privileges, immunities, franchises and powers of whatsoever name or nature which were granted unto the said Oconto Water Company in and by a certain ordinance passed by the common council of the city of Oconto, Wisconsin, and approved by the mayor of said city, July 9, 1890; said ordinance being ordinance No. 153 of said city and being entitled "An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate and maintain water works therein."

Second. One hundred thousand dollars ($100,000) in the capital stock of the said Oconto Water Company; and,

Third. One hundred thousand dollars ($100,000) in the first-mortgage bonds of the said Oconto Water Company, the said stock and bonds being the same held in pledge by the said S. D. Andrews and W. H. Whitcomb, as appears from said judgment, and the rec-

ords and proceedings in said action on file in the office of the clerk of the circuit court of Oconto county, Wisconsin, to have and to hold the above mentioned and described property to the said S. D. Andrews and W. H. Whitcomb, their heirs and assigns forever.

In witness whereof I, the said William K. Smith, referee as aforesaid, have hereunto set my hand and seal this 12th day of September, A. D. 1891.

[SEAL.] WILLIAM K. SMITH, *Referee.*

Done in presence of—
R. L. GRUNERT.
H. SOLWAY.

STATE OF WISCONSIN, } ss:
County of Oconto, }

On this 28th day of September, 1891, before me personally appeared William K. Smith, to me known to be the referee mentioned and described in the foregoing instrument, and the person who subscribed the same and acknowledged that he executed the same as such referee, freely and voluntarily, for the uses and purposes therein expressed.

[NOTARIAL SEAL.] R. L. GRUNERT,
Notary Public in and for Oconto County, Wisconsin.

193 "EXHIBIT K."

STATE OF WISCONSIN:

Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
v.
OCONTO WATER COMPANY, Defendant.

At a special term of said court begun and held at the court-house in the city of Green Bay, Brown county, Wisconsin, on the first Monday, being the 1st day of June, 1891, and on the 28th day of September, 1891, being one of the days of said term.

Honorable Sam'l D. Hastings, Jr., judge presiding.

Upon the judgment herein rendered on the 13th day of August, 1891, and the report of sale of Wm. K. Smith, Esq., referee, made in this action, dated September 20, 1891, and filed in the office of the clerk of this court on the 29th day of September, 1891, and on motion of W. H. Webster, Esq., attorney for the plaintiffs herein, no one opposing—

It is ordered and adjudged, that the report of said referee Wm. K. Smith, be and the same her-by is, in all respects confirmed.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

September 29, 1891.

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No. of certificate.....

No. of shares.....

Amount .....

To whom issued.

.....

P. O. add.....

Date.....

Rec'd..... 18...

Certificate No.....

for .....

Shares .....

.....

Date of surrender.

.....

.....

"EXHIBIT E."

UNITED STATES OF AMERICA.

NUMBER. SHARES.

OCONTO WATER COMPANY,

OCONTO, WISCONSIN.

CAPITAL STOCK, $100,000. 1,000 SHARES, $100 EACH.

This certifies that.....is enti-led to..... shares of the capital stock of the OCONTO WATER COMPANY transferable only on the books of the company in person or by attorney on the surrender of this certificate.

In witness whereof, said company has caused its corporate seal to be hereto affixed and these presents to be signed in its behalf by its president and to be countersigned by its secretary this .....day of.....18.....

Countersigned by.....
Secretary.

.....
President.

STATE OF WISCONSIN.

195 United States Circuit Court, Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY, S. D. ANDREWS, W. H. WHITCOMB, and Others, Defendants.

The replication of The National Foundry and Pipe Works, Limited, complainant, to the answer of S. D. Andrews and W. H. Whitcomb, defendants.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MILLER, NOYES & MILLER,
Complainant's Solicitors.

GEORGE H. NOYES, *Of Counsel.*

(Endorsements:) United States circuit court, eastern district of Wisconsin. In equity. National Foundry and Pipe Works, Limited, complainant, *vs.* Oconto Water Company *et al.*, defendants. Replication. Copy.

196 *Amendment to Bill of Complaint in said Appealed Action.*

United States Circuit Court, Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY, OCONTO CITY WATER SUPPLY COMPANY, *et al.*, Defendants.

And now comes the above-named complainant and files the following as an amendment to its bill herein, as per stipulation on file, to wit:

Said complainant further alleges that since the filing of the bill herein the said defendant, Oconto City Water Supply Company, has been organized and is now existing under and by virtue of the laws of the State of Wisconsin, and claims to own or have some interest in or title to the rights and property of the above-named defendant,

Oconto Water Company, which claim of said defendant is subsequent to the lien of said complainant.

MILLER, NOYES & MILLER,
Solicitors for Complainant.

(Endorsements:) U. S. circuit court, eastern district of Wisconsin. In equity. National Foundry and Pipe Works, Limited, complainant, *vs.* Oconto Water Company *et al.*, defendants. Amendment to complainant's bill. Copy.

197 *Amended Bill in said Appealed Action.*

United States Circuit Court, Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY ET AL., Defendants.

And now comes the above-named complainant and, by leave of court duly granted, files the following as amendments to its bill herein, to wit:

Said complainant further alleges that since the filing of the bill herein a decree has been entered in said circuit court for the eastern district of Wisconsin, in equity, to wit, on the 3d day of October, A. D. 1892, whereby said complainant, The National Foundry and Pipe Works, Limited, has obtained a mechanics' lien upon the well, buildings, machinery, and entire water-works plant and all the right, title, and interest of said Oconto Water Company or of any person claiming under it in and to the premises upon which said plant is located and the franchise of maintaining and operating said plant for the uses to which it is devoted by the law of its incorporation as an entirety, said lien dating and commencing on the 15th day of September, A. D. 1890, which said mechanics' lien, together with any and all other mechanics' liens decreed against the aforesaid premises, said complainant alleges and claims to be a first lien upon the same and entitled to priority over all other liens asserted by or on behalf of any of said defendants.

Said defendant further alleges and charges that it contracted with said defendant, Oconto Water Company, on or about the 28th day of August, 1890, to furnish the pipe and material for the construction of its said water plant, and that it delivered to said Oconto
198 Water Company, at Oconto, Wisconsin, said pipe and materials at various dates, a small portion of which was delivered between the 8th and 15th days of September, 1890, but the greater portion of which was delivered on and between the 16th day of September, 1890, and the 24th day of November, 1890, the exact amount and dates of which more clearly appear from the stipulation between the parties hereto, filed herein on the 1st day of December, 1892; that the terms of payment for which said pipe were to be one-third cash thirty days from the date of delivery at Oconto, and the balance four months from such dates, and that at the request of said

defendant the said complainant on or about the 3d day of October, 1890, received and accepted two notes for five thousand dollars ($5,000) each, payable in four months from said date, with interest at six per cent. per annum from November 1st, 1890.

Said defendant further alleges that at the time of the sale and delivery of all of said pipe and material to said Oconto Water Company it or its agents had no knowledge or information or notice of the said contract or assignment, dated September 13, 1890, made between said defendant, Oconto Water Company, and said defendants, Andrews and Whitcomb, and that in the making of such sale, in the delivery of said materials, in the acceptance of said two notes, and the extension of time of payment for said material on account of the acceptance of said notes, at the respective dates thereof, the said complainant relied upon the franchise of the water company being free and clear of all liens and incumbrances, and if said complainant had had any knowledge or notice of the said contract or of the assignment of September 13, 1890, it would not have made said sale or said delivery of said pipe and materials to said Oconto Water Company, and would not have given credit to said company, and would not have accepted the two notes or either of them which it received from said company on account of the sale and de-
199 livery of said pipe.

Said complainant alleges that it made no examination of the records in the office of the register of deeds of Oconto county or the city clerk of Oconto, nor did it make any other inquiry as to mortgages or incumbrances on the franchise of said Oconto Water Company prior to the making of the aforesaid contract or the delivery of said materials or the receipt and acceptance of said notes. This complainant therefore alleges that, as against the other creditors of said defendant company, the said instruments, dated September 13, 1890, were and are, and each of them was and is, null and void.

(Endorsements:) U. S. circuit court, eastern district of Wisconsin. National Foundry and Pipe Works, Limited, complainant, *v.* Oconto Water Co. *et al.*, defendants. Amendments to bill. Copy.

200 *Answer to Amended Bill in said Appealed Action.*

United States Circuit Court, Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY ET AL., Defendants.

And now come the defendants S. D. Andrews and W. H. Whitcomb, and, by leave of court duly granted, file the following as amendments to their answer to the complainant's bill of complaint herein as amended, to wit:

Said defendants admit that since the filing of the original bill herein a decree has been entered in the circuit court of the United

States for the eastern district of Wisconsin, in equity, in a cause wherein the complainant herein was complainant and the defendant Oconto Water Company was defendant, and that said decree was so entered on the 3d day of October, A. D. 1892, and that amongst other things it was therein decreed that the amount thereby found due complainant for principal and interest was a lien, under chapter 143 of the Revised Statutes of 1878 of the State of Wisconsin and the acts amendatory thereof, upon the well, buildings, machinery, and the entire water-works plant of the defendant in said action, in the city of Oconto, Wisconsin, and upon all the right, title, and interest which the said defendant had in and to the premises described in said decree from and after the date of the commencement of the construction of said well, buildings, machinery, and water-works plant, to wit, the 15th day of September, 1890, or which the said defendant or any and all persons claiming under it had since acquired therein, but these defendants deny that it was therein decreed that any part of said sum was a lien upon said defend-
201 ant Oconto Water Company's franchise of or for maintaining and operating its said water-works plant.

Further answering complainant's amended bill herein, these defendants admit that complainant contracted with said defendant, Oconto Water Company, on the 28th day of August, 1890, to furnish the pipe for the construction of the said water works, and that it thereafter delivered to said defendant, at Oconto, Wisconsin, said pipe at various dates, but at no date prior to the 15th day of September, 1890, on which date defendants allege that the first delivery of any of said pipe to said defendant took place, and that full delivery of all the pipe and material contracted for, as aforesaid, was made between the 15th day of September, 1890, on which dates defendants allege that the first delivery of any of said pipe to said defendant took place, and that full delivery of all of the pipe and material contracted for, as aforesaid, was made between the 15th day of September and the 24th day of November, 1890.

These defendants further admit that the terms of payment for said pipe were as stated in complainant's amended bill, and that complainant received and accepted the notes of said defendant, Oconto Water Company, as stated in its said bill.

Further answering complainant's said amended bill, these defendants say that it may be true for anything they know to the contrary that at the time of the sale and delivery of all of said pipe and material to said Oconto Water Company neither the complainant or any of its agents had any actual knowledge, information, or notice of the contract or assignment of date September 13, 1890, between said defendant, Oconto Water Company, and these defendants, referred to in complainant's amended bill, and they further admit that complainant never examined or caused to be examined the records of the city clerk of the city of Oconto or the records of the register of deeds of Oconto county at any time prior to or at
202 the time of making said contract with said defendant, Oconto Water Company, for said pipe and material, or at any time before the completion and delivery of said pipe and material, and

that said complainant never made any inquiry of any of the officers of said Oconto Water Company, nor of either of these defendants at any time prior to making said contract or of any person or persons whomsoever after the making of said contract, as to whether or not any mortgage or other encumbrance had been placed upon any of the property, rights, or franchise of said defendant, Oconto Water Company.

These defendants deny that the complainant in making its sale, or in the delivery of any of said pipe or material, or in the acceptance of the said notes, or in making any extension of time of payment for said pipe or material, ever relied on the franchise of said defendant, Oconto Water Company, being free and clear of liens and encumbrances; they allege, on the contrary, that in making such sale and delivery of said pipe or material complainant did so uninfluenced by any consideration of the question as to whether there were any liens or encumbrances upon any of the property of said defendant, Oconto Water Company, and without doing anything whatever to ascertain at any time before delivery of all of said pipe or material was completed whether any liens or encumbrances had been placed or made by said defendant, Oconto Water Company, upon any of its property, relying alone upon being able to obtain payment therefor from said defendant, Oconto Water Company, or out of its said water-works plant under the mechanics' lien laws of Wisconsin.

These defendants say that it may be true, for anything they know to the contrary, that if complainant had had knowledge or notice of the contract or of the assignment of date September 13, 1890, referred to in its amended bill, it would not have made delivery of said pipe and material to said Oconto Water Company, or given credit to said company, or accepted either of the notes which
203 it received from said company on account of said sale and delivery of said pipe.

Further answering complainant's amended bill herein, these defendants allege that they were neither parties to the action or in privity with any party to said action in which said lien decree in favor of the complainant was made, rendered, or entered, and that they are in no way bound by any of the provisions of said decree so far as the same decree declares or extends a lien upon any of the property therein described, and they allege that said decree, so far as it decrees such lien, is absolutely void as against them, because no law in force in the State of Wisconsin at any time prior or subsequent to complainant's contract with said Oconto Water Company for the sale and delivery of said pipe or material gave, granted, or created any right to the lien upon any of the property upon which said decree in terms declares or extends a lien.

And these defendants ask that this their amended answer to complainant's bill be treated and considered by the court, so far as the same is applicable thereto, as their answer to any other lien claims herein, whether resting in decree or otherwise, made, filed, or otherwise asserted in this action by any party or parties intervening herein, and that this their amended answer may be considered as a

cross-bill herein to complainant's said amended bill and to any petition of intervention filed herein, and that such affirmative relief as defendants under the law and the rules and practice of this court may be entitled to be granted them herein, and especially that complainant's claim for a lien herein, and all other claims for a lien herein, whether based upon decree, judgment, or other form of claim, be, as against these defendants and those claiming under them, and as against any interest which they or either or any of them may be decreed to have in any of the property affected by this
204 action, decreed to be of no force or effect, and absolutely void and cancelled.

S. D. ANDREWS,
W. H. WHITCOMB, *Defendants*,
By W. H. WEBSTER, *Solicitor*.

205 *Amended Bill in said Appealed Action.*

United States Circuit Court, Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY ET AL., Defendants.

And now comes the above-named complainant and by leave of court duly granted files the following as amendments to its bill herein, to wit:

Said complainant alleges that on and between the 28th day of August, 1890, and the 12th day of November, 1890, at the request of said defendant, Oconto Water Company, said complainant sold and delivered to the said Oconto Water Company certain iron pipe at and for the agreed price of twenty-two thousand four hundred eighty-three and $\frac{41}{100}$ dollars ($22,483.41), and that said pipe was sold and delivered to be used and actually was used by said defendant in the erection and completion of a certain well and water-works plant upon the lands and real estate theretofore purchased and belonging to said defendant, Oconto Water Company; that said iron pipe was laid in and upon said real estate and also in the streets of said city of Oconto and connected with the machinery and apparatus of the defendant so as to constitute a complete system or plant for the pumping and supplying of water to the patrons of said defendant, Oconto Water Company; that said real estate was situate within the corporate city of Oconto and less than one acre in extent.

That the last date upon which said pipe was sold and delivered to said defendant was the 12th day of November, 1890.

That said complainant duly filed, as required by law, its claim for a lien for the amount due and owing from said defendant, in
206 the office of the clerk of the circuit court of the county of Oconto, Wisconsin, on the 28th day of January, 1891, and within six months from the time of the sale and delivery of said iron pipe, which claim for a lien so filed was in all respects a com-

pliance with the statutes of the State of Wisconsin, and that one year did not elapse after the furnishing of the pipe aforesaid before the commencement of a suit by said complainant to foreclose the same against the property of said defendant, Oconto Water Company.

That the lien of said complainant on account of said pipe so furnished dated and commenced on the 15th day of September, 1890, that being the date of the commencement of the construction of the building, machinery, erection, well, and plant of said defendant, Oconto Water Company.

And also files the following (as an amendment to its prayer for relief in said bill, to wit):

That all creditors of the defendant Oconto Water Company who have or may hereafter intervene herein, exhibit, and prove their claims, whether secured or unsecured, against said defendant, Oconto Water Company, and in default thereof be precluded from all benefit of the decree which shall be made in this action, and from any final distribution which shall be made in the same, and that said complainant and R. D. Wood & Company, intervening petitioners herein, be decreed to have mechanics' liens against the property and franchises of said defendant, Oconto Water Company, and that such liens be adjudged prior in time to any lien or incumbrances on said property asserted or claimed by or on behalf of the defendants S. D. Andrews and W. H. Whitcomb, and that upon final distribution of the property of the said defendant, Oconto Water Co., or the proceeds of the sale thereof the said complainant and said R. D. Wood & Company be first paid the amount of their respective claims as secured creditors.

MILLER, NOYES & MILLER,
Solicitors for Complainant.

207 *Answer to Amended Bill in said Appealed Action.*

United States Circuit Court, Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY, S. D. ANDREWS, W. H. WHITCOMB, Impleaded, etc., Defendants.

And now come the defendants, S. D. Andrews and W. H. Whitcomb, and by leave of court duly granted, make and file the following as amendments to their answer to complainant's bill of complaint herein as amended, to wit:

Said defendants admit that said complainant, between the 28th day of August, 1890, and the 12th day of November, 1890, at the request of the defendant Oconto Water Company, sold and delivered to the said Oconto Water Company certain iron pipe at *the* for the agreed price of $22,483.41, and that said pipe was sold and delivered to be used and actually was used by said defendant, Oconto Water

Company, in the erection and completion of the well and water-works plant mentioned in complainant's amendments to its bill herein filed April 11, 1895, and that said iron pipe was laid in and upon the real estate and also in the streets of said city of Oconto and connected with the machinery and apparatus of the said defendant, Oconto Water Company, so as to constitute a complete system or plant for the pumping or supplying of water to the patrons of said defendant, Oconto Water Company, and that said real estate was situated within the corporate city of Oconto, and was less than one acre in extent, all as stated in complainant's amendments to its bill herein filed April 11, 1895.

Said defendants also admit that the last date upon which said pipe was delivered to said defendant, Oconto Water Company,
208 was the 12th day of November, 1890.

Said defendants also admit that the complainant duly filed in the office of the clerk of the circuit court of the county of Oconto, Wisconsin, on the 28th day of January, 1891, a written instrument purporting to be a claim for a lien for the amount due and owing from said defendant, Oconto Water Company, which written instrument, when so filed, omitting Exhibit "A" therein mentioned therefrom, was in the words and figures of Exhibit "A" hereto attached, which is here referred to and made a part hereof, and they allege that no other or different claim for a lien was ever filed in the office of the clerk of the circuit court of the county of Oconto, Wisconsin, by, for, or on behalf of said complainant or any one claiming under it.

Said defendants admit that one year did not elapse after the fornishing of the pipe aforesaid by said complainant to said defendant Oconto Water Company, as aforesaid, before the commencement of the suit by said complainant, referred to in its amended bill herein, to foreclose its lien claim for the same against the property of said defendant, Oconto Water Company, which suit is the one in which the decree was rendered in favor of the complainant and against the said defendant, Oconto Water Company, mentioned and referred to in the amendments filed by complainant to its bill herein December 15, 1894.

Said defendants deny that the 15th day of September, 1890, was the date of the commencement of the construction of the building, machinery, erection, well, or plant of said defendant, Oconto Water Company, mentioned and referred to in complainant's amendments to its bill filed herein April 11, 1895, and they allege that such construction work did not commence prior to the 28th day of September, 1890.

Said defendants, further answering the amended bill of com-
209 plaint herein say that it is provided by section 3318 of the Revised Statutes of the State of Wisconsin for the year 1878, as amended by chapter 287 of the Laws of Wisconsin for the year 1881 and by chapter 84 of the Laws of Wisconsin for the year 1882, the same being part of chapter 143 of said statutes, the chapter under which complainant claims the lien which they seek to enforce in this suit, and to which these defendants beg leave to refer, as follows:

"No lien hereby given shall exist, and no action to enforce the same shall be maintained, unless within six months from the date of the last charge for performing such work or labor, or of the furnishing of such materials, a claim for such lien shall be filed as hereinafter provided, in the office of the clerk of the circuit court of the county in which the lands affected thereby lie, nor unless such action be brought within one year from such date, unless within thirty days next preceding the expiration of one year the person filing the lien shall make and annex to the instrument on file, an affidavit setting forth the interest which he has by virtue of such lien in the property therein mentioned, upon which affidavit the clerk shall endorse the time when the same was filed. The effect of such affidavit shall not continue beyond one year from the time when such lien would otherwise cease to be valid as against subsequent purchasers, liens or mortgages, in good faith. Such claim for lien may be filed and docketed within such six months, notwithstanding the death of the owner of the property affected thereby, or of the person with whom the original contract was made, with like effect as if he were then living."

That the complainant or any one for it never made or annexed or caused to be made and annexed to the instrument purporting to be its claim for a lien filed by it in the office of the clerk of the circuit court for Oconto county, Wisconsin, as stated in its said bill,
210 any affidavit setting forth the interest which it had or claims to have by virtue of such lien or claim of lien in the property therein mentioned, or any affidavit whatever, nor has complainant, except by the filing of said instrument in the office of the clerk of the circuit court of Oconto county, Wisconsin, and the commencement and prosecution of its action against defendant Oconto Water Company for the foreclosure of its said lien claim, in which the lien decree mentioned in its amended bill herein was obtained, ever taken any step or steps or instituted any proceeding, suit, or action for the continuance or enforcement of its said lien claim, nor was any action or proceeding in which either of these defendants or any one claiming under them was a party ever brought by complainant either within one year from the date of the last charge for the furnishing of such pipe by complainant to said defendant, Oconto Water Company, or at any time, to enforce its said claim for a lien upon any of the property affected by this action or referred to in the claim for a lien filed as aforesaid by said complainant in the office of the clerk of the circuit court of Oconto county, Wisconsin, and these defendants rely, and will at the final hearing of this action and at all times rely and insist, upon the statute of limitations created by said section 3318 of the Revised Statutes of Wisconsin for the year 1878, and the amendments thereto hereinbefore referred to, as a bar and defense to complainant's claim for a lien upon said property or any part thereof as against these defendants or those claiming under them, and the interest which they or either of them have or ever had or may be decreed herein to have or to have had in said property.

The said defendants, further answering the complainant's amended

bill herein, say that, except as above admitted, stated, or qualified, no allegation of said amended bill is true.

And the said defendants, further answering, deny that the said complainant is entitled to the relief or any part thereof in
211 & 212 its bill of complaint herein, as amended, demanded; and these defendants pray the same advantage of their aforesaid amended answer as if they had pleaded or demurred to the said bill of complaint as amended April 12, 1895.

W. H. WEBSTER,
Solicitor for Defendants S. D. Andrews and W. H. Whitcomb.

STATE OF WISCONSIN, } ss:
County of Oconto, }

W. H. Webster, being first duly sworn, deposes and says that he is solicitor for the defendants S. D. Andrews and W. H. Whitcomb in this suit and makes this affidavit of verification for and in their behalf; that he drew and is familiar with the foregoing amended answer of the said defendants, S. D. Andrews and W. H. Whitcomb; that the same is true of deponent's own knowledge; that the reason why this verification is not made by one of said defendants, S. D. Andrews or W. H. Whitcomb, is because they are both non-residents of the State of Wisconsin, residents of the State of Maine, and are both at present absent from the State of Wisconsin and from the county of Oconto therein, where affiant resides.

W. H WEBSTER.

Subscribed and sworn to before me on this 12th day of April, 1895.

[SEAL.] WM. K. SMITH,
Notary Public, Oconto Co., Wisconsin.

213 EXHIBIT A.

To the honorable the circuit court for Oconto county, in the State of Wisconsin:

The National Foundry and Pipe Works, Limited, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, of Scottdale, in the county of Westmoreland and State of Pennsylvania, who appears therefor by Miller, Noyes & Miller, its attorneys, exhibits and files this its claim for a lien, which is founded upon a demand by it against the Oconto Water Company, a private and domestic corporation, of the State of Wisconsin, with its principal office in the city of Oconto, in the county of Oconto, in the State of Wisconsin, and thereupon respectfully represents:

That the said National Foundry and Pipe Works, Limited, is now, and was at the several times hereinafter mentioned, a Pennsylvania corporation, doing business as such in Scottdale, in the county of Westmoreland and State of Pennsylvania, and elsewhere.

That on and between the 28th day of August, A. D. 1890, and the

12th day of November, A. D. 1890, at the special instance and request of the Oconto Water Company aforesaid, said National Foundry and Pipe Works, Limited, furnished and delivered to said Oconto Water Company certain iron pipe mentioned and described in Exhibit "A" hereto attached and made a part hereof; that said materials were sold to be used and were actually used in the erection and completion of a certain well and water-works plant, the main part of which is situated upon the land or real estate described as follows, to wit: Part of lot five (5), in section nineteen (19), town twenty-eight (28) north of range twenty-two (22) east, viz., commencing at the southwest corner of the Denny lot on the east line of State street, thence south along the east line of State street one hundred and twenty-seven (127) feet to the north line of
214 Chicago street extended, thence east twelve (12) rods to the Schufeldt lot, thence north along west line of Schufeldt lot twenty-two (22) rods, thence west four (4) rods, thence south sixteen (16) rods, thence west eight (8) rods to place of beginning, in the city and county of Oconto and State of Wisconsin; that said iron pipe furnished by said claimant to said Oconto Water Company as aforesaid are laid from said real estate above described under the streets of said city of Oconto to many portions of the city, and, together with the well aforesaid and with certain pumping machinery hereafter to be placed on said above-described land form one single complete system or plant for the pumping and supplying of water to the patrons of said Oconto Water Company.

That said Oconto Water Company was at the times hereinafter mentioned the owner of said premises hereinbefore described and of the said plant, and still is such owner, as petitioner is informed and believes; that said premises are less than one acre in area or extent, and are within the limits of an incorporated city.

That the last date of the performance of the labor and the furnishing of the materials aforesaid was the 12th day of November, A. D. 1890.

That the property affected by this claim for lien is that hereinbefore described, and that the amount claimed to be due by reason of the premises is twenty-two thousand four hundred and eighty-three and forty-one one-hundredths dollars ($22,483.41), together with interest on $10,000 from November 1st, 1890, and on $1,786.75 from December 4th, 1890, and on $4,578.69 from December 10th, 1890, and on $6,117 97 from December 16th, 1890.

That six months have not elapsed since the said materials were furnished as aforesaid.

Wherefore your petitioner prays that it may have a lien upon said pipe and plant erected, as aforesaid and upon all the
215 right, title, and interest which said Oconto Water Company had in and to said premises upon which said plant and well are situated and to which said pipes are connected, at the time said materials were furnished, as aforesaid, to wit, on the 28th day of August, A. D. 1890, or that said Oconto Water Company may have acquired since said time, to the amount of $22,483.41, as aforesaid, together with interest, as aforesaid, and the costs of this claim, and

of enforcing the same, in accordance with the statute in such case made and provided.

Dated the 27th day of January, A. D. 1891.

MILLER, NOYES & MILLER,
Attorneys for Claimant.

216 Opinion of Jenkins, circuit judge, reported in 68 Fed., 1006.

Decision circuit court of appeals, reported in 76 Fed. Rep., 166.

Decision on petition for rehearing, reported in 77 Fed. Rep., 774.

Mandate of court of appeals, as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for
[SEAL.] the eastern district of Wisconsin, Greeting:

Whereas lately, in the circuit court of the United States for the eastern district of Wisconsin, before you or some of you, in a cause between National Foundry and Pipe Works, Limited, complainant, and Oconto Water Company, Charles C. Garland, S. D. Andrews, W. H. Whitcomb, F. H. Todd, George W. Sturtevant, Jr., S. W. Ford, Minneapolis Trust Company, Oconto National Bank, City of Oconto, Matt. S. Wheeler, A. J. Elkins, N. S. Todd, and Oconto City Water Supply Company, defendants, the decree of the said circuit court entered on the 17th day of July, 1895, was in the following words, to wit:

This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

First. That the said defendant, Oconto Water Company, was and is insolvent, and that all its stock, property, things in action, and effects be sequestrated, and that a distribution of the same or of the proceeds of the sale or collection thereof be made among its creditors, according to law, and in the order of their priority.

217 Second. That the said complainant, The National Foundry and Pipe Works, Limited, and the intervening petitioners herein, R. D. Wood & Company, have liens upon all the rights, franchises, and property of the Oconto Water Company and of the plant constructed by said company in the city of Oconto, Wisconsin, pursuant to and as provided in the mechanics' lien decrees of this court in favor of said complainant, National Foundry and Pipe Works, Limited, rendered against said defendant, Oconto Water Company, on the 3d day of October, 1892, for the sum of $25,637.32, with interest thereon from the 3d day of October, 1892, at the rate of seven per cent. per annum, and in favor of said intervening petitioners, R. D. Wood & Company, to April 1, 1893, and thereafter at the rate of six per cent. per annum, rendered in said court against said Oconto Water Company on the 20th day of February, A. D. 1894, for the sum of $3,575, with interest on the same from the 20th day of February, 1894, at the rate of six per cent. per annum.

Third. That the said defendants, S. D. Andrews and W. H. Whitcomb, were privies to and are concluded by the aforesaid mechanics' lien decrees of said complainant and of said R. D. Wood & Company.

Fourth. That the said mechanics' liens decreed to said complainant and said R. D. Wood & Company were and are each of them valid and effectual and should be enforced, and are liens prior to that of the instrument claimed to be a mortgage bearing date September 13, A. D. 1890, under which said defendants, Andrews and Whitcomb, assert their right to a lien upon and title to the franchises and property of said defendant, Oconto Water Company, and are superior and paramount to any and all other liens or rights of said Andrews and Whitcomb upon or in said franchises and property.

Fifth. That the said complainant, The National Foundry and Pipe Works, Limited, and the said intervening petitioners herein, R. D. Wood & Company, be, and they are hereby, authorized to
218 proceed to the enforcement and satisfaction of their respective mechanics' liens upon and against the franchises and property of said Oconto Water Company in accordance with and as provided in their respective decrees establishing the same.

Sixth. That the said defendants, S. D. Andrews and W. H. Whitcomb, were and are the stockholders of said defendant, Oconto Water Company, owning and holding all the shares of its capital stock amounting in the aggregate to the sum of one hundred thousand dollars ($100,000), which said stock was issued and assigned to them without any sum *from* having been paid therefor by any one, and they received the same with knowledge thereof, and that the said defendants, Andrews and Whitcomb, are liable for all unpaid amounts upon such stock so far as may be necessary to discharge the indebtedness of said Oconto Water Company, not exceeding, however, the sum of one hundred thousand dollars ($100,000).

Seventh. That said defendant, Oconto Water Company, was and is indebted to the intervening petitioner herein, Chapman Valve Manufacturing Company, as an unsecured creditor, under and by virtue of a judgment in favor of said Chapman Valve Manufacturing Company entered and docketed in the circuit court of Oconto county, Wisconsin, on the 9th day of February, 1892, for the sum of eight hundred thirty-eight and $\frac{88}{100}$ dollars ($838.88), with interest thereon from the 9th day of February, 1892, at the rate of seven per cent. per annum to April 1, 1893, and thereafter at the rate of six per cent. per annum.

Eighth. That the said defendant, Oconto Water Company, was and is indebted to the intervening petitioner, Sherwood, Sutherland & Company, as an unsecured creditor in the sum of seven hundred ninety and $\frac{22}{100}$ dollars ($790.22), with interest thereon from the 30th day of January, 1891, at the rate of seven per cent. per annum to April 1, 1893, and thereafter at the rate of six per cent. per
219 annum.

Ninth. That said defendant, Oconto Water Company, was and is indebted to the intervening petitioner, Dickinson Bros. & King, as an unsecured creditor, in the sum of three hundred forty-one and $\frac{63}{100}$ dollars ($341.63), with interest thereon from the 4th

day of February, 1891, at the rate of seven per cent. per annum, to April 1, 1893, and thereafter at the rate of six per cent. per annum.

Tenth. That said defendant, Oconto Water Company, was and is indebted to the intervening petitioner, Cook & Hyde, as an unsecured creditor, in the sum of eighty-five dollars ($85), with interest thereon from the 10th day of January, 1891, at the rate of seven per cent. per annum, to April 1, 1893, and thereafter at the rate of six per cent. per annum.

Eleventh. That said defendants, S. D. Andrews and W. H. Whitcomb, be, and they are hereby, ordered and required and are hereby adjudged to pay the amounts respectively adjudged due to the above-mentioned unsecured creditors, to wit, Chapman Valve Manufacturing Company, Sherwood, Sutherland & Company, Dickinson Bros. and King, and Cook & Hyde, together with their respective costs as herein adjudged; and also that said defendants, S. D. Andrews and W. H. Whitcomb, be, and they are hereby, ordered and required to pay any deficiency that may be found due to said secured creditors, to wit, the said National Foundry and Pipe Works, Limited, and the said R. D. Wood & Company, if any there shall be, after applying to the satisfaction of their said respective mechanics' lien decrees hereinbefore referred to the proceeds of the sales made thereunder, the amount of such deficiency being made to appear to the satisfaction of this court and an order for such payment entered at the foot of this decree.

Twelfth. That the bonds issued by said defendant, Oconto Water Company, and secured by its mortgage or trust deed to said defendant, The Minneapolis Trust Company, dated the first of No-
220 vember, 1890, amounting to the sum of one hundred thousand dollars ($100,000), and which bonds were delivered to said defendants, Andrews and Whitcomb, were issued contrary to the statutes of the State of Wisconsin and were and are void, and the said defendants, Andrews and Whitcomb, are hereby ordered to deliver up all of said bonds so issued and delivered to them to the clerk of this court, to be cancelled.

Thirteenth. That the said instruments executed in the name of the Oconto Water Company to said defendants, Andrews and Whitcomb, were made in good faith and for a valuable consideration, and were not withheld from record by their procurement nor with their consent nor in fraud of creditors.

Fourteenth. That the compensation for the services and disbursements of said receiver and of his counsel be, and the same is hereby, fixed and allowed at the sum of five thousand five hundred dollars, and that the same be paid, after deducting therefrom the sum of three thousand dollars ($3,000), heretofore by order of this court retained by said receiver, by the said defendant, Oconto City Water Supply Company, out of the moneys heretofore turned over to it arising from the operation of said water plant by said receiver.

Fifteenth. It is further ordered, adjudged, and decreed that the complainant do have and recover of the said defendants, S. D. Andrews and W. H. Whitcomb, two hundred and fifty-four dollars and ten cents, its costs herein taxed, and that in default of payment of

the same within ten days the complainant have execution therefor, as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the seventh circuit by virtue of an appeal agreeable to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the term of October, in the year of our Lord one thousand eight hundred and ninety-six, the said cause came
221 on to be heard before the said United States circuit court of appeals for the seventh circuit on the said transcript of record, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said circuit court with instructions to dismiss the appeal for want of equity.

October 5, 1896.

And afterwards, to wit, on the 3d day of November, 1896, the appellees filed their petition for a rehearing herein, which said petition was on the 5th day of January, 1897, overruled; and afterwards, to wit, on the 5th day of November, 1896, the appellants filed their motion and suggestions for mandate.

On consideration whereof it is ordered by the court that motion of appellants in the cause "that mandate should direct that provision be made in the decree for the conveyance to appellant Oconto Water Supply Company of the legal title to the land holding the pumping station and wells of the water-works plant" be, and the same is hereby, overruled, with leave to the court below to make necessary and proper orders for the transmission of legal title to property.

May 18, 1897.

You therefore are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said decree notwithstanding.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Costs, $15.80.

222 Circuit Court of the United States for the Eastern District of Wisconsin. In Equity.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Complainant,
vs.
OCONTO WATER COMPANY, CHARLES C. GARLAND, S. D. ANDREWS, W. H. Whitcomb, F. H. Todd, George W. Sturtevant, Jr.; S. W. Ford, Minneapolis Trust Company, Oconto National Bank, City of Oconto, Matt. S. Wheeler, A. J. Elkins, N. S. Todd, and Oconto City Water Supply Company, Defendants.

This cause came on to be reheard upon the record herein and upon the mandates of the United States circuit court of appeals for the seventh circuit upon the appeals from the decree entered herein on the 17th day of July, 1895, taken by the said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company, and The City of Oconto, which said mandates have heretofore been filed herein, and, after argument of counsel, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

First. That the decree of said court of July 17, 1895, do stand as entered, except that as to said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company, and City of Oconto, the bill of complaint herein be, and the same is hereby, dismissed for want of equity, with costs in favor of said defendants, taxed at the sum of one thousand eight hundred and twenty $\frac{35}{100}$ dollars, except that the defendant Oconto City Water Supply Company is required to pay the amount adjudged in said decree or judgment in favor of Albert E. Smith, receiver, being the sum of twenty-five hundred dollars ($2,500).

Second. That said bill of complaint be, and the same is hereby, dismissed as to the defendants Charles C. Garland, F. H. Todd, Matt. S. Wheeler, A. J. Elkins, and N. S. Todd for want of service
223 of process upon them, but without costs.

Third. That a decree *pro confesso* having been heretofore entered against the said defendants, Minneapolis Trust Company, Oconto National Bank, and S. W. Ford, all of which said defendants were duly served with process or duly appeared herein, the said bill be, and hereby is, dismissed as to said defendants, but without costs.

Fourth. That the clerk of this court be, and he is hereby, directed to restore to the defendants S. D. Andrews and W. H. Whitcomb the possession of all the bonds secured by the mortgage or trust deed of the Oconto Water Company dated the 1st day of November, 1890, which were deposited with said clerk by said Andrews and Whitcomb; that such restoration by said clerk to said Andrews and Whitcomb is, and shall be, without adjudging the validity or invalidity of the said bonds in their hands or the issue of the same by said Oconto Water Company.

Fifth. That the legal title to the land upon which the pumping ation and wells of the water-works plant are located, which heretofore by deed dated the 31st day of January, A. D. 1894, was con-

veyed by the order of this court by the city of Oconto to the said defendant, Oconto Water Company, the description of which said land is more fully set out in said deed as follows, to wit:

Part of lot five (5), section nineteen (19), in township twenty-eight (28) north of range twenty-two (22) east, commencing at the southwest corner of that part of said lot conveyed by David Bowles and wife to John Denny, thence south six (6) rods, thence east twelve (12) rods, thence north twenty-two (22) rods, thence west four (4) rods, thence south sixteen (16) rods, thence west eight rods to place of beginning, and being a part of lot No. five (5), of section No. nineteen (19), in township twenty-eight (28) north of range No. twenty-two (22) east; also—

Commencing at the northeast corner of Chicago and State
224 streets and running thence north along the east side of State street thirty-four (34) feet, thence east along south side of J. B. Duchaine's place two hundred (200) feet, thence running south to the north line of Chicago street, thence running west parallel with Chicago street to place of beginning, being a part of lot five (5), in section nineteen (19), township twenty-eight (28) north of range twenty-two (22) east, be, and the same is hereby, passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, executed by said defendant, Oconto Water Company, to said defendants, S. D. Andrews and W. H. Whitcomb, and of the sale in the proceedings to foreclose the same to the said defendant, Oconto City Water Supply Company, as the assignee and successor in interest of the said defendants, S. D. Andrews and W. H. Whitcomb, and that the said defendant, Oconto Water Co., and its receiver, Albert E. Smith, by separate instruments duly witnessed and acknowledged so as to entitle the same to record, execute and deliver conveyances thereof to the defendant Oconto City Water Supply Company, but without prejudice to any rights which said complainant or said R. D. Wood & Company may have under their said mechanics' lien decrees or otherwise to redeem from said instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same.

Sixth. That the said defendant, George W. Sturtevant, Jr., against whom a decree *pro confesso* has been heretofore entered in this action, was and is the assignee and successor in interest of the said defendant, Charles C. Garland who subscribed for 990 shares of the capital stock of the said defendant, Oconto Water Company, and was and is the owner and holder of said 990 shares of the capital stock of said Oconto Water Company, which said stock was issued and all rights under which said subscription therefor was assigned
225 to said George W. Sturtevant, Jr., without anything having been paid therefor by him or by the said Charles C. Garland or by any one, and which he received with knowledge thereof, and that the said defendant, George W. Sturtevant, Jr., is liable for the unpaid amount due upon such subscription and stock, so far as may be necessary to discharge the indebtedness of said Oconto Water Company heretofore adjudged herein, not exceeding, however, the sum of ninety-nine thousand dollars ($99,000).

Seventh. That the said defendant, George W. Sturtevant, Jr., be, and he is hereby, ordered and required and is hereby adjudged to pay the amounts respectively adjudged due by the decree of this court, entered on the 17th day of July, A. D. 1895, from the defendant Oconto Water Company to its unsecured creditors herein, to wit, (1) to Chapman Valve Manufacturing Company; (2) to G. W. Sherwood, B. Sutherland, and George W. Oakes, constituting the firm of Sherwood, Sutherland & Company; (3) to William Dickinson, John W. Dickinson, Courtland P. Dixon, Jerome A. King, and Ira C. Hutchinson, constituting the firm of Dickinson Brothers & King, and (4) to Thomas D. Cook and Edwin Hyde, constituting the firm of Cook & Hyde, and that in default of the payment of the same execution do issue, as provided by law, and also that said defendant, George W. Sturtevant, Jr., be, and he is hereby, ordered and adjudged to pay any deficiency that may be found due to the complainant, National Foundry and Pipe Works, Limited, and to Richard Wood, Walter Wood, Stuart Wood, and George Wood, constituting the firm of R. D. Wood & Company, if any there shall be after applying to the satisfaction of their respective mechanics' lien decrees hereinbefore adjudged against said Oconto Water Company the proceeds of the sales made thereunder, the amount of such deficiency being made to appear to the satisfaction of this court, and an order for such payment entered at the foot of this decree after the amount of such deficiency shall be ascertained, and that in default of the payment of said deficiency when so ascertained and ordered paid, execution do issue as provided by law.

226 Eighth. It is further ordered, adjudged, and decreed that the complainant do have and recover of the said defendant, George W. Sturtevant, Jr., two hundred and fifty-four dollars and ten cents, its costs properly taxable against him herein, and that in default of the payment of the same within ten days the complainant have execution therefor.

Dated July 29th, 1897.

JAS. G. JENKINS,
U. S. Circuit Judge.

227 *Record in the Oconto County Court.*

THE STATE OF WISCONSIN, *ss:*

Circuit Court, Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
vs.
OCONTO WATER COMPANY, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according

to the demand of the complaint of which a copy is herewith served upon you.

W. H. WEBSTER,
Plaintiffs' Attorney.

Dated June 17, 1891.

Post-office address, Oconto, Oconto county, Wisconsin.

STATE OF WISCONSIN, } ss:
County of Oconto, }

I certify that on the seventeenth (17th) day of June, 1891, at the city of Oconto, in said county, I personally served the within summons on the within-named defendant, Oconto Water Company, a corporation, by then and there delivering and leaving with S. W. Ford, who was then and there the secretary of and a director of said defendant corporation, a true copy of said summons, and I endorsed the date of service thereof on the copy so served.

JAS. HURLEY, *Sheriff,*
By LUKE WALSH, *Under Sheriff.*

228 *Fees.*

Service	$1.00
Travel, 2 mi	.20
Folios, 1	.10
	$1.30

Endorsed: Filed August 13, 1891. Henry Watermolen, clerk circuit court, Brown county, Wisconsin. Oconto county, Wisconsin. Filed in office of clerk of circuit court August 15, 1891. R. L. Hall, clerk.

STATE OF WISCONSIN:

In Circuit Court for the County of Oconto.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
vs.
OCONTO WATER COMPANY, Defendant.

The above-named plaintiffs complain of the above-named defendant and for a cause of action allege:

First. That during all of the times herein mentioned the plaintiffs were copartners, doing business as such under the firm name and style of Andrews & Whitcomb.

Second. That during all of the times herein mentioned the defendant was and still is a corporation, with its principal place of business in the city of Oconto, Wisconsin, duly organized, existing, and operating under and in virtue of the laws of said State, under articles of incorporation in the following words and figures, to wit:

229 *Articles of Association and Incorporation of the Oconto Water Co. of Oconto, Oconto Co., Wisconsin.*

Know all men by these presents that we, F. B. Barnes, J. W. McCabe, and W. E. Krippine, being all adult persons and being all residents of the city of Oshkosh, Winnebago county, Wisconsin, do hereby associate ourselves together as a corporation and body politic, under and by virtue of the provisions of chapter 86 of the Revised Statutes of Wisconsin of 1878 and the several acts amendatory thereof, and for that purpose do hereby declare and adopt the following articles of incorporation, to wit:

Article 1.

This corporation is formed for the purpose of constructing and operating water works in the city of Oconto, in Wisconsin, for supplying said city and its inhabitants with water for protection against fire and for domestic, manufacturing, and other purposes. The said corporation shall have power and authority to acquire and hold, sell and convey, at its pleasure, any such estate, real, personal, or mixed, as may be necessary or proper for the benefit or advantage of said corporation, and have, enjoy, and possess all the powers and privileges necessarily incident to the business and purposes of said corporation.

Article 2.

The name of said corporation shall be "Oconto Water Company." It shall be located at Oconto, Oconto county, Wisconsin, and its principal business office shall be at that place.

Article 3.

The capital stock of said corporation is hereby fixed at one hundred thousand (100,000) dollars, the number of shares at one thousand (1,000), and the amount of each share at one hundred (100) dollars.

230 Article 4.

The general officers of said corporation shall be the president, the secretary and the treasurer, and a board of three directors, all of whom shall be elected annually and shall hold their respective offices until successors are elected and qualified.

Article 5.

A meeting of the stockholders of this corporation shall be held at its office or other designated room in said city of Oconto, on the 15th day of July, A. D. 1890, for the purpse of electing directors and the transaction of such other business as may properly come before the meeting. At such election each stockholder shall be entitled to one vote for each share of stock owned by him or her and duly entered by name on the stock certificate book of said corporation. Such vote may be cast by proxy duly authorized in writing. The votes

of the majority of stock present by owners or proxies shall be necessary to an election or the transaction of any other business at any meeting of the stockholders. The board of directors shall hold a meeting on the same day and at the same place of their election (a majority of the members thereof being a quorum) and shall elect from their number the president, secretary, and treasurer.

Article 6.

It shall be the duty of the president to preside at all meetings of the stockholders or the directors. He shall be the general manager of the business and affairs of said corporation. He shall sign all orders, certificates of stock, bonds, etc., and perform all other acts incident to such corporate office, or that may be prescribed by the by-laws, rules, or regulations of said corporation. It shall be the duty of the treasurer to care for all the funds of the corporation, keep an accurate account of the same, and render a state-
231 ment of the condition of the funds of said corporation whenever called upon so to do by the board of directors, president, or the holders and owners of a majority of its stock.

He shall also perform such other duties as may be required of him by the board of directors, and shall give bond, in such amount as may be required by the directors, for the faithful performance of his duties. It shall be the duty of the secretary to keep a record of all the business meetings of the corporation and the votes therein in a book to be kept for that purpose, and he shall also keep a book for recording all transfers of stock. He shall notify all members of the corporation of all meetings to be held, stating the time, place, and purpose of meeting, a copy of which notice shall, at least seven days before the day appointed for the meeting, be given to each stockholder of record, or left at his residence or usual places of business, or properly addressed and mailed to him through the post-office.

He shall call all special meetings of the corporation upon the request of the president, board of directors, or holders of record of one-fourth of the capital stock of the corporation. He shall countersign all orders, certificates of stock, bonds, etc., when duly signed by the president, and shall perform all other duties properly required of him by the corporation or its board of directors.

Article 7.

Any *bona fide* holder of the stock of this corporation shall be a member thereof. Certificates of stock shall be transferred by endorsement, but only valid, except as between the parties to such transfer, until the name shall have been so entered upon the books of the said corporation as to show the names of the parties, by and to whom transferred, the number and designation of the share or shares, and the dates of the transfer.

Article 8.

The board of directors of said corporation or a majority
232 thereof, may from time to time make, adopt, and alter such by-laws, rules, and regulations for the management of the

business thereof as they may deem proper, the same not being repugnant to these articles or the laws of Wisconsin.

In witness whereof the said F. B. Barnes, J. W. McCabe, and W. R. Krippene, the above-named incorporators, have signed the foregoing articles this eighth day of July, 1890, and affixed their seals thereto.

F. B. BARNES. [SEAL.]
J. W. McCABE. [SEAL.]
W. E. KRIPPENE. [SEAL.]

In presence of—
A. E. CASE.
E. R. WILLIAMS.

STATE OF WISCONSIN, }
Winnebago County. }

Be it remembered that on the eighth day of July, 1890, personally appeared before me the above-named F. B. Barnes, J. W. McCabe, and W. E. Krippene, to me known to be the persons who signed the foregoing articles of incorporation and to be residents of the city of Oshkosh, in said county, and adults, and acknowledged the same.

[NOT. SEAL.]

A. E. CHASE,
Notary Public, Winnebago Co., Wis.

Third. That said defendant on the 13th day of September, A. D. 1890, being thereunto by law and its board of directors duly authorized, and with the consent of a majority of its stockholders, all duly made and given, for the purpose of borrowing money from the plaintiffs and to procure security for the repayment thereof, made and entered into an agreement in writing with the plaintiffs, who also executed the same, which agreement, after being fully executed, was in the following words and figures—that is to say:

(Here follows agreement of September 13th, 1890, being in the words and figures of Exhibit A attached to the answer of Andrews & Whitcomb in suit in United States court, entitled National Foundry and Pipe Works, Ld., *vs.* Oconto Water Company *et al.*)

233 Fourth. That at the time of making and entering into said agreement with the plaintiffs, as above set forth, the said defendant was the owner of a certain franchise theretofore duly granted it by the city of Oconto, a municipal corporation of Wisconsin, mentioned in said agreement, and had accepted the same and had fully performed all of the conditions prescribed in the ordinance of said city granting the same to the said defendant, necessary to the vesting of said franchise in said defendant, and was in the full enjoyment thereof, the ordinance granting the same having theretofore been duly adopted, signed, approved, and published so as to make the same effectual, and being in the following words and figures—that is to say:

(Here follows ordinance No. 153, being in the words and figures of Exhibit C attached to the aforesaid answer of Andrews & Whitcomb.)

Fifth. That upon the execution of said agreement of September 13, 1890, as aforesaid, and thereafter, upon the same day, the plaintiffs and defendant made, entered into, and executed an agreement or instrument in writing in the following words and figures—that is to say:

(Here follows said agreement, being in the words and figures of Exhibit B attached to the aforesaid answer of Andrews & Whitcomb.)

Sixth. That upon the execution of said agreement or instrument last above referred to, as aforesaid, the said defendant delivered to, and the plaintiffs received and have ever since retained the same as constructive delivery of such franchise, a copy of the ordinance granting to the defendant the franchise above mentioned and hereinbefore referred to, together with one hundred thousand dollars ($100,000) in its capital stock, the same being the entire issue
234 of stock of said defendant, and also one hundred thousand dollars ($100,000) in the first-mortgage bonds of the said defendant, such delivery and receipt of said copy of ordinance stock and bonds being made pursuant to and in virtue of the provisions of said instrument of September 13, 1890, set forth in the last preceding paragraph.

Seventh. That upon the execution of the agreement of September 13, 1890, first above set forth as aforesaid, and at divers times thereafter, and in virtue of the provisions thereof, the plaintiff- loaned to and the defendants borrowed of the plaintiffs various sums of money, in all forty thousand dollars ($40,000).

Eighth. That at the various times of obtaining said several sums of money, as aforesaid, the said defendant made, executed, and delivered to the plaintiffs its promissory note in writing for the amount received on each occasion, bearing date the day the same was received, which notes, eleven in all, collectively show the several amounts so obtained and the respective dates of obtaining the same, and were in the following words and figures—that is to say:

"$2,500.00. OCONTO, WIS., *Sept.* 15, 1890.

January 1, 1891, after date, for value received, we promise to pay to the order of S. D. Andrews and Whitcomb twenty-five hundred dollars, payable at the Oconto nat'l bank, Oconto, Wis., with interest at seven (7) per centum from date until paid

OCONTO WATER COMPANY,
By C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y.*

$2,500.00. OCONTO, WIS., *Sept.* 25, 1890.

January first, 1891, after date, for value received, we promise to pay to the order of Andrews & Whitcomb twenty-five hundred dollars, at the Oconto nat'l bank, Oconto, Wisconsin, with interest from date at seven (7) per cent. per annum until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

235 $5,000.00. OCONTO, WIS., *Oct.* 1, 1890.

January first, 1891, after date, for value received, we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the Oconto nat'l bank, Oconto, Wisconsin, with interest from date, at seven (7) per cent. per annum, until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

$2,500.00. MINNEAPOLIS, MINN., *Oct.* 15, 1890.

January first, 1891, after date, we promise to pay to the order of Andrews & Whitcomb twenty-five hundred dollars, at the office of the Garland Banking Co., value received, with interest at seven per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

Due — 1–3, '91.

$2,500.00. MINNEAPOLIS, MINN., *Oct.* 17, 1890.

January first, 1891, after date, we promise to pay to the order of Andrews & Whitcomb twenty-five hundred dollars, at the office of the Garland Banking Co., value received, with interest at seven per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 7. Due Jan'y 4.

$2,500.00. MINNEAPOLIS, MINN., *Oct.* 20, 1890.

January first, after date, we promise to pay to the order of Andrews & Whitcomb twenty-five hundred dollars, at the office of the Garland Banking Company, with exchange on New York, value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

Due Jan. 1–4, '91.

$2,500.00. MINNEAPOLIS, MINN., *Oct.* 20, 1890.

January first, after date, we promise to pay to the order of Andrews & Whitcomb twenty-five hundred dollars, at office of the Garland Banking Co., with exchange on New York, value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 8. Due Jan'y 1–4.

$5,000.00. MINNEAPOLIS, MINN., *Oct.* 25, 1890.

Four months after date we promise to pay to the order of
236 Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 10. Due Feb'y 25–28.

$5,000.00. MINNEAPOLIS, MINN., *Oct.* 30, 1890.

Three months after date we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 11. Due Jan'y 30–February 2.

$5,000.00. MINNEAPOLIS, MINN., *November* 1, 1890.

Three months after date we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 12. Due Feb'y 1–4.

$5,000.00. MINNEAPOLIS, MINN., *Dec.* 22, 1890.

March first, after date, we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 17. Due March 4."

Ninth. That upon the maturity of such of said notes as were given the plaintiffs by the defendant, as aforesaid, as by their terms matured January 1, 1891, viz:

One for $2,500, of date September 15, 1890;
One for $2,500, of date September 25, 1890;
237 One for $5,000, of date October 1, 1890;
One for $2,500, of date October 15, 1890;
One of $2,500, of date October 17, 1890;
One of $2,500, of date October 20, 1890,

and another for $2,500, of date October 20, 1890, the defendant paid the accrued interest thereon, viz., the sum of three hundred and forty dollars and seventy-three cents ($340.73), and having the right so to do in virtue of the provisions of the agreement or instrument of date September 13, 1890, first executed on that date by the plaintiffs and the defendant, which is hereinbefore referred to and set forth, on the 4th day of January, 1891, took up said notes and gave renewal notes therefor, four in number, bearing date on that day, each being for $5,000 and each payable March 1st after date; which four last-mentioned notes were in the following words and figures—that is to say:

$5,000.00. MINNEAPOLIS, MINN., *Jan'y* 4, 1891.

March 1st, after date, we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 14. Due March 4th.

$5,000.00. MINNEAPOLIS, MINN., *Jan'y* 4, 1891.

March 1st, after date, we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 15. Due March 4th.

$5,000.00. MINNEAPOLIS, MINN., *Jan'y* 4, 1891.

March 1st, after date, we promise to pay to the order of
238 Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y and Treas.*

No. 13. Due March 4th.

$5,000.00. MINNEAPOLIS, MINN., *Jan'y* 4, 1891.

March 1st, after date, we promise to pay to the order of Andrews & Whitcomb five thousand dollars, at the office of the Garland Banking Co., value received, with interest at seven (7) per cent. per annum from date until paid.

OCONTO WATER COMPANY.
C. C. GARLAND, *Pres't.*
F. H. TODD, *Sec'y-Treas.*

No. 16. Due March 4th.

Tenth. That all of said notes so given by the defendant to the plaintiffs, as aforesaid, and the additional sum of $5,000, which the defendant in and by said contract agreed to pay the plaintiffs, matured and became payable prior to the commencement of this action, and, although payment thereof was demanded by the defendant at such maturity, payment was refused, and no part of any of said notes or of said sum of $5,000 has ever been paid, and the whole amount, principal and interest, was due and unpaid at the time of the commencement of this action.

Eleventh. That the plaintiffs were at the commencement of this action and have ever since remained the sole owners and holders of each and all of said notes and of all of the securities given by the defendant to the plaintiffs as collateral thereto.

For a second cause of action herein against the defendant the plaintiffs complain and allege:

First. That all of the allegations of fact contained in the first and second paragraphs of the first cause of action stated herein against the defendant are and each and every one of them is true, as
239 stated in each of said paragraphs, and are here pleaded in manner and form as pleaded in said first cause of action, and are referred to as though here fully set forth in the same order and words.

Second. That said defendant, on the 13th day of March, A. D. 1891, being thereunto by law and its board of directors duly authorized, and with the consent of a majority of its stockholders, all duly made and given for the purpose of borrowing more money from the plaintiffs, and to provide security for the repayment as well as security for the repayment of other moneys furnished and advanced the defendant by the plaintiffs after the execution of the first agreement mentioned in the first cause of action herein, of date September 13, 1890, in excess of the sum of forty thousand dollars therein provided for, made and entered into another agreement in writing with the plaintiffs, who also executed the same; which agreement, after being fully executed, was in the following words and figures—that is to say:

(Here follows agreement of March 13, 1891, being in the words and figures of Exhibit G, attached to the aforesaid answer of Andrews & Whitcomb.)

Third. That the contract of September 13, 1890, referred to as such in the first recital in said contract of March 13, 1891, above set forth, is the contract referred to and set forth in the third paragraph of the first cause of action herein, and the stock and bonds and the rights, privileges, immunities, franchises, and powers mentioned and referred to in the second recital in said contract of March 13, 1891, are the stock and bonds referred to also in said contract of September 13, 1890, and the rights, privileges, immunities, franchises, and powers mentioned and referred to in and assigned by the written instrument mentioned and set forth in the

fifth paragraph of the first cause of action herein, which in-
240 strument is also the written instrument mentioned and referred to in the same recital of said contract of March 13, 1891.

Fourth. That after the execution of the first of said agreements of September 13, 1890, mentioned and referred to in the first cause of action herein, as therein stated and set forth, the plaintiffs, at the request of the defendant and to enable said defendant to continue the construction of and carry to completion the water-works plant and system therein mentioned and referred to, advanced and furnished the defendant, in excess of the sum of forty thousand dollars therein provided for, various sums at various times prior to March 13, 1891, amounting in all to $4,489.79, as follows, that is to say, on January 21, 1891, $1,843.17; on February 5, 1891, $551.55; on February 18, 1891, $1,395.07, and on March 11, 1891, $700.

Fifth. That pursuant to the provisions and conditions of said contract or agreement of March 13, 1891, above referred to, the defendant, on the said 13th day of March, 1891, after the execution of said agreement of that date, made, executed, and delivered to the plaintiffs its promissory notes bearing that date, five in number, all payable sixty days after date, as follows, that is to say, one for $1,843.17, drawing interest from January 21, 1891; one for $551.55, drawing interest from February 5, 1891; one for $1,395.07, drawing interest from February 18, 1891; one for $700, drawing interest from March 11, 1891, and one for $12,000, drawing interest from date, the latter being given for the new loan of that amount then made by the plaintiffs to the defendant pursuant to the provisions of said contract of March 13, 1891, which notes are in the following words and figures, to wit:

$1,843.17. OCONTO, *March* 13, 1891.

Sixty (60) days after date I promise to pay to the order of Andrews & Whitcomb eighteen hundred forty-three and $\frac{17}{100}$ dol-
241 lars, at Oconto, Wis., value received, with interest at the annual rate of seven (7) per cent. from January 21, 1891.

OCONTO WATER COMPANY,
By GEO. W. STURTEVANT, JR., *Pres't.*

Countersigned:

S. W. FORD, *Sec'y.*

$551.55. OCONTO, *March* 13, 1891.

Sixty (60) days after date I promise to pay to the order of Andrews & Whitcomb five hundred fifty-one and $\frac{55}{100}$ dollars, at Oconto, Wis., value received, with interest at the annual rate of seven per cent. from February 5, 1891.

OCONTO WATER COMPANY,
By GEORGE W. STURTEVANT, JR., *Pres't.*

Countersigned:

S. W. FORD, *Sec'y.*

$1,395.07. OCONTO, *March* 13, 1891.

Sixty (60) days after date I promise to pay to the order of Andrews & Whitcomb thirteen hundred ninety-five and $\frac{7}{100}$ dollars, at Oconto, Wis., value received, with interest at the annual rate of seven per cent. from February 18, 1891.

OCONTO WATER COMPANY,
By GEO. W. STURTEVANT, JR., *Pres't.*

Countersigned:

S. W. FORD, *Sec'y.*

$700. OCONTO, *March* 13, 1891.

Sixty (60) days after date I promise to pay to the order of Andrews & Whitcomb seven hundred dollars, at Oconto, Wis., value received, with interest at the annual rate of seven per cent. from March 11, 1891.

OCONTO WATER COMPANY,
By GEO. W. STURTEVANT, JR., *Pres't.*

Countersigned:

S. W. FORD, *Sec'y.*

$12,000.00. MARCH 13, 1891.

Sixty (60) days after date I promise to pay to the order of Andrews & Whitcomb twelve thousand dollars, at Oconto, Wis., value received, with interest at the annual rate of seven per cent.

OCONTO WATER COMPANY,
By GEO. W. STURTEVANT, JR., *Pres't.*

Countersigned:

S. W. FORD, *Sec'y.*

242 Sixth. That all of said notes so given by the defendant to the plaintiffs, as stated in the last preceding paragraph, became due and payable prior to the commencement of this action, and payment of each thereof was demanded by the plaintiffs of the defendant, but no part of the same has ever been paid.

Seventh. That the plaintiffs were at the time of the commencement of this action and ever since have been the sole owners and holders of all of said notes.

Eighth. That said defendant, on the 16th day of May, 1891, being thereunto by law and its board of directors duly authorized, and with the consent of a majority of its stockholders, all duly made and given for the purpose of borrowing more money from the plaintiffs, and to provide security for the repayment thereof, as well as security for the repayment of other moneys furnished and advanced the defendant by the plaintiffs after the execution of the agreement of date March 13, 1891, set forth in the second cause of action hereinbefore stated, in excess of the sum of twelve thousand dollars ($12,000) therein provided for, made and entered into another agreement in writing with the plaintiffs, who also executed the same; which agreement, after being fully executed, was in the following words and figures—that is to say:

(Here follows agreement of May 16, 1891, in the words and figures of Exhibit H, attached to the aforesaid answer of Andrews & Whitcomb.)

(Here follows Exhibit A, referred to in the foregoing contract of May 16, 1891, said Exhibit A being the contract of March 13, 1891, set forth in the statement of the second cause of action herein.)

Ninth. That the agreement of date March 13, 1891, and the ordinance of the city of Oconto, No. 153, and the agreements of date September 13, 1890, and the franchise, capital stock, and bonds of the Oconto Water Company, and the other securities, all mentioned and referred to in the contract last above set forth, are the
243 same as those mentioned and referred to in the contract bearing date March 13, 1891, above set forth in this cause of action.

Tenth. That after the execution of the said contract of date March 13, 1891, mentioned and referred to and hereinbefore set forth, the plaintiffs, at the request of the defendant, and to enable said defendant to continue the construction of and carry to completion the water-works plant and system therein mentioned and referred to, advanced and furnished the defendant, in excess of the sums of money therein provided for, various sums at various times prior to May 16, 1891, which are those referred to in the second recital of facts in the contract of date May 16, 1891, above set forth in this cause of action, and, pursuant to the provisions and conditions of said last-mentioned contract, the defendant, after the execution thereof, made further advances of money to the said plaintiffs, which several sums so advanced and loaned the defendant by these plaintiffs, as aforesaid, in excess of the sum of $12,000 provided for in said contract of March 13, 1891, and under and pursuant to the provisions of the contract of May 16, 1891, now aggregate more than $6,000, and said water-works plant or system is not yet completed and will require, and this the plaintiffs allege upon information and belief, in order to fully complete and equip said plant so that the same will be accepted by the city of Oconto, further advances nearly, if not quite, up to the limit of fifteen thousand dollars, provided for in the contract above set forth, of date May 16, 1891, and the plaintiffs will be obliged, as further sums are needed for that purpose, to advance and furnish the same up to said limit of $15,000, by reason of the covenants and conditions by them to be performed contained in said contract of May 16, 1891.

Eleventh. That no part of the sums so advanced the defendant by the plaintiffs, as aforesaid, for the repayment of which pro-
244 vision is made by said contract of May 16, 1891, was due or payable at the time of the commencement of this action, but the same will all be due and payable in sixty days from May 16, 1891.

Wherefore the plaintiffs demand judgment herein against the defendant as follows:

First. For the sum of $61,489.79, together with interest at the annual rate of seven per cent. on the sum of $5,000 from October

25, 1890, and on the further sum of $5,000 from October 30, 1890, and on the further sum of $5,000 from November 1, 1890, and on the further sum of $5,000 from December 22, 1890, and on the further sum of $20,000 from January 4, 1891, and on the further sum of $1,843.17 from January 21, 1891, and on the further sum of $551.55 from February 5, 1891, and on the further sum of $1,395.07 from February 18, 1891, and on the further sum of $700 from March 11, 1891, and on the further sum of $12,000 from March 13, 1891, besides the costs and disbursements of this action.

Second. That the full amount, principal, interest, and costs, for which judgment is rendered against the defendant in favor of the plaintiffs herein be decreed to be a lien upon the securities assigned and pledged by the defendant to the plaintiffs in accordance with the provisions of the contracts and agreements between them hereinbefore set forth, of date September 13, 1890, and March 13, 1891, and that the same be sold subject to the rights and interests of the plaintiffs therein, under and in virtue of the contract of May 16, 1891, hereinbefore set forth, to pay the amount of said judgment so far as the sums realized upon such sale, after deducting the costs of sale, will pay the same; and,

Third. For such other or further relief herein as to the court may seem just and equitable, besides the costs and disbursements of this action.

W. H. WEBSTER,
Plaintiffs' Attorney.

245 STATE OF WISCONSIN, } ss:
County of Oconto, }

S. D. Andrews, being sworn, deposes and says that he is one of the plaintiffs named in the foregoing entitled action and knows the facts therein set forth; that he makes this affidavit for and on behalf of the plaintiffs; that the foregoing complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

S. D. ANDREWS.

Subscribed and sworn to before me on this 30th day of July, 1891.

R. L. GRUNERT,
Notary Public, Oconto Co., Wisconsin.

STATE OF WISCONSIN:

In Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs, }
vs.
OCONTO WATER COMPANY, Defendant. }

STATE OF WISCONSIN, } ss:
Oconto County, }

W. H. Webster, being sworn, says he is the attorney for the plaintiffs in the above-entitled action; that the summons in said action

was served on the defendant therein at the city and county of Oconto, Wisconsin, on the 17th day of June, 1891, by the sheriff of said county, as appears from his return of service thereon; that more than twenty days have elapsed since such service, and said defendant has served no notice of appearance upon deponent or at his office and has in no way or manner appeared in said action.

W. H. WEBSTER.

Subscribed and sworn to before me this 13th day of August, 1891.

W. K. SMITH,
Notary Public, Wisconsin.

246 STATE OF WISCONSIN:

In Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
vs.
OCONTO WATER COMPANY, Defendant.

At a special term of said court begun and held at the court-house, in the city of Green Bay, Brown county, Wisconsin, on the first Monday, being the first day of June, 1891, and on the 13th day of August, 1891, being the 74th day of said term, Hon. Sam'l D. Hastings, Jr., judge, presiding.

This action having been commenced on the 17th day of June, 1891, by the service of the summons herein on that day, at the city and county of Oconto, Wisconsin, by the sheriff of said county, on said defendant, as appears from said sheriff's return upon said summons on file, and more than twenty days having elapsed since such service, and said defendant not having appeared herein, as appears from the affidavit of W. H. Webster, the plaintiffs' attorney herein, on file, and the plaintiffs having submitted their proofs of the allegations of fact set forth in the complaint herein, from which it appears that all of the allegations of fact therein set forth are true, the court finds as facts that all of said allegations of fact are true.

As conclusions of law the court finds:

First. That at the commencement of this action the defendant was, and still is, indebted to the plaintiffs in the sum of $61,489.79 on account of the matters and things set forth in the complaint herein, besides interest at the annual rate of seven per cent. on the following sums from the following dates, to date, to wit:

On the sum of $5,000 from October 25, 1890, the same being $280.03.

247 On the sum of $5,000 from October 30, 1890, the same being $275.17.

On $5,000 from November 1, 1890, the same being $274.20.
On $5,000 from December 22, 1890, the same being $224.61.
On $20,000 from January 4, 1891, the same being $855.68.
On $1,843.17 from January 21, 1891, the same being $72.42.
On $551.55 from February 5, 1891, the same being $20.28.
On $1,395.07 from February 18, 1891, the same being $47.45.
On $700 from March 11, 1891, the same being $20.80, and on the

sum of $12,000 from March 13, 1891, the same being $326.80, the amount, principal and interest, of such indebtedness now being $63,887.23.

Second. That the plaintiffs are entitled to a personal judgment against the defendant, Oconto Water Company, for said sum of $63,887.23, and for the costs and disbursements of this action.

Third. In addition*al* to such personal judgment, the plaintiffs are entitled to a further judgment decreeing, adjudging, and declaring the amount thereof, together with the proper costs for the enforcement of the same, a lien upon all of the property shown by the complaint in this action and the proofs adduced by the plaintiff herein in support thereof to have been sold, assigned, transferred, and set over or pledged to the plaintiffs by the defendant in trust and as collateral security for the repayment of the sums loaned and advanced the defendant by the plaintiffs under the contracts set forth in the complaint, which property consists of and is the following, to wit:

First. All the rights, privileges, immunities, franchises, and powers of whatsoever name or nature which were granted the said defendant in and by a certain ordinance passed by the common council of the city of Oconto, Wisconsin, and approved by the mayor of said city, July 9, 1890, said ordinance being ordi-
248 nance No. 153 of said city, and being entitled "An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain water works therein."

Second. One hundred thousand dollars ($100,000) in the capital stock of the said defendant, and

Third. One hundred thousand dollars ($100,000) in the first-mortgage bonds of the said defendant, and that the same, or so much thereof as may be necessary to make the amount of the personal judgment herein ordered to be recovered by the plaintiffs of and against the defendant, with interest and costs, unless full payment thereof is made by the defendant upon demand after the rendition of judgment herein, be sold to make the same, and that in case of sale thereof such sale be made by Wm. K. Smith, Esq., of the city and county of Oconto, Wisconsin, who shall be named in and appointed by the judgment to be rendered herein a referee to make such sale, and that before making such sale said referee shall first give notice thereof by publishing the same or causing the same to be published at least once in each week for four successive weeks in the Oconto County Reporter, a newspaper published weekly in the city and county of Oconto, Wisconsin; said judgment or decree shall further provide that in case of sale of said property as above contemplated the same be made, and the notice of such sale shall so state, subject to the rights, interests, and claims of the plaintiffs in said property, under and in virtue of the contract between the plaintiffs and the defendant of date May 16, 1891, which is referred to and set forth in the complaint herein, and said decree shall provide that none of such rights, interests, or claims shall be impaired by

such sale. Said decree shall further provide that in case of sale the plaintiffs may bid thereat for all or any of said property, and in case their bid be accepted or taken by the referee
249 they shall have credit on their said bid to the amount of the personal judgment recovered by them herein, with interest and costs, if so much be bid by them; if a less amount be bid by them, then they shall have credit to the extent of the amount bid by them. Said decree shall further provide that in case of sale as above provided for, and its confirmation, the same shall vest in the purchaser or purchasers, subject to the rights, interests, and claims of the plaintiffs under the said contract of May 16, 1891, as above provided for, the absolute legal title in and to all of the property so sold, free and clear of all rights, claims, or equity or equities of redemption of the defendant and of all persons whomsoever claiming by, through, or under said defendant subsequent to the acquirement by the plaintiffs of their rights, interests, and claims under the contracts between them and the defendant set forth in the complaint herein, and the referee shall give the purchaser at such sale an instrument or bill of sale in writing in proper form showing his purchase and the terms thereof, and shall make report of his doings under such decree to the court for confirmation or such action as to the court may seem just.

Let judgment be entered accordingly, and the plaintiffs' costs and disbursements inserted when taxed.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

August 13, 1891.

(Here follows judgment dated August 13, 1891, being in the words and figures of Exhibit I attached to the aforesaid answer of Andrews & Whitcomb in United States court.)

Circuit Court, Oconto County.

S. D. ANDREWS and W. H. WHITCOMB
against
OCONTO WATER COMPANY.
} Term 189–.

250	Entering suit	$ .50
	Indexing	.10
	Filing papers, 8 at 10c	.80
	Entering return of one service, 10c	.10
	Recording folios, 15 at 10c	1.50
	Affidavits	.25
	Docketing judgment	1.00
	Making judgment-roll	.50
	Taxing costs	.25
		$5.00

(Filed Aug. 15, 1891.
R. L. HALL, *Clerk.*)

State tax	$1.00
Clerk's fees	5.00
	$5.00

R. L. HALL, *Clerk.*

251 STATE OF WISCONSIN:

In Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
vs.
OCONTO WATER COMPANY, Defendant.

Plaintiffs' Cost Bill.

Retainer		$3.00
Brief and copies		2.00
One term fee		2.00
Drawing summons and complaint, 153 fols. at 25c		38.25
Eng. 1, file 1, keep 1, serve 1,612 fols. at 12c		73.44
Drawing aff't of default, 2 fols. at 25c		.50
Eng. 1, file 1, keep 1, 6 fols. at 12c		.72
Drawing findings and conclusions, 23 fols. at 25c		5.75
Eng. 1, file 1, keep 1, 69 fols. at 12c		8.28
Drawing judgment, 15 fols. at 25c		3.75
Eng. 1, file 1, keep 1, 45 fols. at 12c		5.40
Drawing cost bill, 4 fols. at 25c		1.00
Eng. 1, file 1, keep 1, 12 fols. at 12c		1.44
Motion for judgment		.62½
Attending judge out of term		1.00
Disbursements.		
State tax	$1.00	
Clerk's fees	5.00	
Notary's fees, 3 aff'ts	.75	
Sheriff's fees	1.30	
	$8.05	8.05
Total		$155.20

STATE OF WISCONSIN, } ss:
County of Oconto, }

252 W. H. Webster, being sworn, says he is the attorney for the plaintiffs in this action; that the foregoing items of disbursements are each correct and have been actually paid or necessarily incurred by the plaintiffs in this action.

W. H. WEBSTER.

Subscribed and sworn to before me this 15th day of August, 1891.

R. L. HALL,
Clerk Circuit Court, Oconto County, Wisconsin.

253 Office of clerk of circuit court.

OCONTO CO., WIS., *Aug.* 15, 1891.

On motion of W. H. Webster, attorney for the plaintiffs in the foregoing-entitled action, the plaintiffs' costs and disbursements therein, no one appearing to oppose, are hereby taxed and allowed at the sum of one hundred and fifty-five and $\frac{20}{100}$ dollars ($155.20).

R. R. HALL, *Clerk.*

(Here follows referee's report of sale dated September 20, 1891, being in the words and figures of Exhibit J, attached to the aforesaid answer of Andrews & Whitcomb in United States court.)

EXHIBIT A.

(Referred to in annexed report of referee.)

OCONTO, *Aug.* 13, 1891.

To Oconto Water Company and S. D. Andrews, as treasurer of said company:

We hereby demand of you payment in full of the sum of $64,042.43, being the amount of the judgment this day recovered against you, the said Oconto Water Company, by the undersigned, S. D. Andrews and W. H. Whitcomb, in an action in the circuit court of Oconto county, wherein the said Andrews & Whitcomb are plaintiffs and you, the said Oconto Water Company, are defendant.

S. D. ANDREWS AND
W. H. WHITCOMB,
Judgment Creditors,
By W. H. WEBSTER,
Their Attorney.

OCONTO, *Aug.* 13, 1891.

I hereby acknowledge the making of the within demand and refuse to pay any part of the sum therein demanded, for the reason that the Oconto Water Company has no funds with which to pay any part thereof.

S. D. ANDREWS,
Treasurer of Oconto Water Co.

254 (Filed Sept. 29, 1891. Henry Watermolen, clerk circuit court, Brown Co., Wis.) (Oconto Co., Wis. Filed in office of clerk of circuit court Sept. 30, 1891. R. L. Hall, clerk.)

EXHIBIT B.

(Referred to in annexed referee's report.)

STATE OF WISCONSIN:

Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
vs.
OCONTO WATER COMPANY, Defendant.

STATE OF WISCONSIN, } ss:
County of Oconto, }

W. H. Webster, being sworn, deposes and says he is the attorney for the plaintiffs in this action; that after the rendition of the judgment in this action, and on the same day, to wit, August 13, 1891, deponent demanded of the treasurer of the defendant, Oconto Water Company, viz., S. D. Andrews, payment in full of the amount of said judgment, viz., $64,042.43, payment of any part of which was, upon such demand, refused on the ground that there were no funds in the treasury of the defendant, and that the defendant was without any funds whatever with which to pay any part of said judgment; that deponent made such demand as the attorney of the plaintiffs in this action and for and in behalf of the plaintiffs herein.

W. H. WEBSTER.

Subscribed and sworn to before me this 15th day of September, 1891.

R. L. GRUNERT,
Notary Public, Oconto Co., Wis.

(Filed Sept. 29, 1891. Henry Watermolen, clerk circuit court, Brown Co., Wis.) (Oconto Co., Wis. Filed in office of clerk of circuit court Sept. 30, 1891. R. D. Hall, clerk.)

255 EXHIBIT C.

(Referred to in annexed report of sale of Wm. K. Smith, referee.)

Publisher's Affidavit.

STATE OF WISCONSIN, } ss:
Oconto County, }

C. S. Hart, of said county, being duly sworn, deposes and says that he is the printer of the Oconto County Reporter, a public newspaper printed and published in the city of Oconto, county of Oconto, and that the notice, of which the annexed is a printed copy, taken from the paper in which it was published, was inserted and published in said newspaper four weeks successively, at least once each

week, commencing on the 14th day of August, 1891, and ending on the 11th day of September, 1891.

C. S. HART.

Subscribed and sworn to before me this 25th day of September, 1891.

R. P. SMITH,
Notary Public, Oconto Co., Wis.

Notice of Sale.

By virtue and in pursuance of a decree of the circuit court of Oconto county, Wisconsin, in an action wherein S. D. Andrews and W. H. Whitcomb, copartners as Andrews & Whitcomb, are plaintiffs, and Oconto Water Company is defendant, I will, at the Oconto nat'l bank, in the city and county of Oconto, Wisconsin, on the twelfth (12th) day of September, 1891, at 10 o'clock a. m., offer for sale and sell to the highest bidder therefor all of the property hereinafter described, or so much thereof as may be necessary to make the amount of the judgment recovered by the said Andrews & Whitcomb in said action, with interest and costs, subject, however, to the rights, interests, and claims of the said Andrews & Whitcomb therein under and in virtue of a certain contract between them as one party thereto and the said Oconto Water Company as the other party
256 thereto, which bears date May 16, 1891, and obligates the said Andrews & Whitcomb, in a certain event, to advance and loan to the said Oconto Water Company, from time to time after May 16, 1891, as the same should be needed to complete the water-works system and plant of the said Oconto Water Company, in the city and county of Oconto, Wisconsin, money to the amount, but not in excess, of fifteen thousand dollars ($15,000), for the repayment of so much of which as shall be actually loaned and advanced by the said Andrews & Whitcomb to the said Oconto Water Company, together with interest thereon at the annual rate of seven per cent. from the date of such loan or advance thereof, the said property and all of the same is, by said contract, which is fully set forth in the complaint in said action, mortgaged, pledged, and vested in the said Andrews & Whitcomb by the said Oconto Water Company as collateral security. The property so to be offered and sold, as above set forth, consists of and is the following, to wit:

First. All the rights, privileges, immunities, franchises, and powers of whatsoever name or nature which were granted unto the said Oconto Water Company in and by a certain ordinance passed by the common council of the said city of Oconto, and approved by the mayor of said city July 9, 1890, said ordinance being ordinance No. 153 of said city, and being entitled "An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate, and maintain water works therein;"

Second. One hundred thousand dollars ($100,000) in the capital stock of the said Oconto Water Company; and,

Third. One hundred thousand dollars ($100,000) in the first-mortmage bonds of the said Oconto Water Company.

W. K. SMITH.

Dated August 13, 1891.

257 A referee appointed in and by the decree rendered in the action referred to in the foregoing notice of sale to make said sale.

(Oconto Co., Wis. Filed in the office of the clerk of circuit court Sept. 30, 1891. R. L. Hall, clerk.) (Filed Sept. 29, 1891. Henry Watermolen, clerk circuit court, Brown Co., Wis.)

EXHIBIT D.

(Referred to in annexed report of referee.)

OCONTO, WIS., *Sept.* 25, 1891.

Mr. W. K. Smith, referee, etc., to Oconto County Reporter, Dr.

Sept. 11.—To advertising sale of property under decree of S. D. Andrews *et al.* against Oconto Water Co., $11.80.
Rec'd payment.

C. S. HART.

(Filed Sept. 29, 1891.) Henry Watermolen, clerk circuit court, Brown Co., Wisconsin. (Oconto county, Wis. Filed in office of clerk of circuit court Sept. 30, 1891. R. L. Hall, clerk.)

EXHIBIT E.

(Referred to in annexed report of referee.)

OCONTO, *Sept.* 12, 1891.

Received of Webster & Martineau one and $\frac{75}{100}$ dollars in full for the transcript of judgment in Andrews & Whitcomb *v.* Oconto Water Co.

$1.75

R. L. HALL,
Clerk Circuit Court,
By R. L. HALL, JR., *Deputy.*

(Oconto Co., Wis.. Filed in office of clerk of circuit court Sept. 30, '91. R. L. Hall, clerk.) (Filed Sept. 29, 1891. Henry Watermolen, clerk circuit court, Brown Co., Wis.)

(Here follows Exhibit F, referred to in referee's report, being in the words and figures of Exhibit F of said report, attached to
258 the answer of Andrews & Whitcomb aforesaid in United States court.)

STATE OF WISCONSIN:

Circuit Court for Oconto County.

S. D. ANDREWS and W. H. WHITCOMB, Plaintiffs,
vs.
OCONTO WATER COMPANY, Defendant.

At a special term of said court begun and held at the court-house, in the city of Green Bay, Brown county, Wisconsin, on the first Monday, being the first day of June, 1891, and on the 28th day of September, 1891, being one of the days of said term, Hon. Sam'l D. Hastings, Jr., judge, presiding.

Upon the judgment herein rendered on the 13th day of August, 1891, and the report of sale of Wm. K. Smith, Esq., referee, made in this action, dated September 20, 1891, and filed in the office of the clerk of this court on the 29th day of September, 1891, and on motion of W. H. Webster, Esq., attorney for the plaintiffs herein, no one opposing—

It is ordered and adjudged that the report of said referee, Wm. K. Smith, be, and the same hereby is, in all respects confirmed.

By the court:

SAM'L D. HASTINGS, JR., *Judge*.

September 29, 1891.

(Oconto Co., Wis. Filed in office of clerk of circuit court Sept. 30, 1891. R. L. Hall, clerk.)

(Filed Sept. 29, 1891. Henry Watermolen, clerk circuit court, Brown Co., Wis.)

(The foregoing was all introduced in evidence and constituted part of the record and printed transcript in the action appealed to the United States circuit court of appeals, mentioned in the 17th subdivision of the answer herein as amended, except the pleadings and decree in such action, and was taken from said transcript as
259 the evidence herein by stipulation of the parties, and is all the evidence introduced on the trial hereof.)

260 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Findings of Fact and Conclusions of Law as Modified.

This cause having been tried before the court without a jury, the court hereby makes its findings of fact and conclusions of law as follows, to wit:

Findings of Fact.

First. That while the plaintiff was at all the times mentioned in the pleadings and still is nominally a limited partnership, it was at said times and still is really a corporation and the same party for

and against whom, as the National Foundry and Pipe Works, Limited, the decree and decisions mentioned in the pleadings were made and entered.

Second. That the defendant was organized under chapter 86, pursuant to the authority of section 1788 of the Revised Statutes of Wisconsin, by the purchasers at the sale on the foreclosure of the Andrews and Whitcomb mortgages mentioned in the pladings, and that on such organization the said purchasers transferred to the defendant corporation the rights, powers, privileges, franchises, and property embraced in said mortgage and sale.

Third. That the plaintiff sold and delivered to the Oconto Water Company iron pipe which was used as in the complaint alleged, and which said iron pipe has not been paid for, and that said plaintiff filed a claim for lien therefor and its bill to foreclose such lien, and that a decree was entered in said suit as in the complaint alleged, and that there was a marshal's sale and deed under
261 said decree, as in the complaint alleged.

Fourth. That suit was commenced to foreclose the mortgages or pledges of Andrews and Whitcomb, and that judgment was entered in said suit and sale made under said judgment, as in the complaint alleged.

Fifth. That said mortgages or pledges of Andrews and Whitcomb, the foreclosure thereof and foreclosure sale thereunder, and the said transfer from the purchasers on such sale to the defendant embraced the water-works plant, as well as the franchises named in said mortgages.

Sixth. That on or about the 5th day of October, A. D. 1896, a decision was made in an action theretofor commenced in the circuit court of the United States for the eastern district of Wisconsin and pending on appeal in the United States circuit court of appeals for the seventh circuit, wherein the plaintiff herein was the complainant and one of the appellees and this defendant, together with S. D. Andrews, W. H. Whitcomb, and The City of Oconto, were defendants and appellants, whereby said United States circuit court of appeals for the seventh circuit did reverse the decree rendered by the circuit court for the eastern district of Wisconsin, and did issue its mandate therein to said circuit court, and upon the same being there received and filed, a decree in accordance with said mandate was, on the 29th day of July, 1897, entered in said court, which said decree has never been appealed from, modified, or altered; that said decision of said United States circuit court of appeals is reported in volume 76 of the Federal Reporter, on pages 166, 167, and the determination of said court on the petition for rehearing therein is reported in volume 77 of said Federal Reporter, at pages, 774-778; that in and by said decision and said decree it was decided that the said mechanics' lien decree of said complainant was binding on the said Oconto Water Company, but that it was not binding on
262 this defendant, Oconto City Water Supply Company; that as to this defendant complainant never had any mechanics' lien; that the issues raised by the pleadings in said Federal court as to the existence and supremacy of such lien against this defendant were

the same as in this case, and that the questions therein decided are the same as are involved in this case, and that the questions there decided became by the decree of said court *res adjudicata* between the parties hereto.

Seventh. That on or about the first day of December, A. D. 1890, the said S. D. Andrews and W. H. Whitcomb knew and at all times since have known that said plaintiff furnished the pipe used in the construction of said water plant and had not been paid for the balance remaining due for and on account thereof, and that on January 13th, 1891, Andrews and Whitcomb were informed that the plaintiff claimed a lien on said plant for said pipe, and that Andrews and Whitcomb did not then think that the plaintiff had such lien and relied upon their securities.

Conclusions of Law.

First. That the plaintiff has not and never had any lien on the water-works plant and property on which it claims such lien.

Second. That the defendant holds and owns said plant and property by claim and title paramount and free and clear of any claim or lien of the plaintiff.

Third. That the plaintiff is not entitled to any of the relief demanded in the complaint as amended or otherwise.

Fourth. That the defendant is entitled to judgment on the merits dismissing the complaint and action.

Date, ——, 1898.

By the court:

SAM'L D. HASTINGS, JR., *Judge.*

263 The plaintiff duly made the following requests of said court, to wit:

Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

Now comes the above-named plaintiff and requests the court to make the following finding of fact:

First. That at and prior to the commencement of said suit by said S. D. Andrews and W. H. Whitcomb in the said circuit court of Oconto county to foreclose their said mortgages or pledges they knew and ever since said time have known that said plaintiff filed its claim for a mechanics' lien against the said pipe and the said water plant, and had commenced proceedings in said circuit court of the United States for the eastern district of Wisconsin for the enforcement of said lien.

Said plaintiff requests the court to make the following conclusion of law:

First. That this action is not barred by virtue of the sixth finding of fact herein.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

The court refuses the requests of the plaintiff to make the above finding of fact and the above conclusion of law.

SAM'L D. HASTINGS, JR., *Judge.*

The plaintiff duly excepted to the refusal of the court to make findings, as above requested, as follows:

The plaintiff, by its attorneys, excepts to the ruling of the
264 court refusing to make the above finding of fact, and also to its ruling refusing to make the above conclusion of law.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

265 Thereupon the plaintiff duly filed its exceptions to the findings of the court, as follows:

Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

And now comes the above-named plaintiff, by Miller, Noyes, Miller & Wahl, its attorneys, and excepts to the second finding of fact and to each and every part thereof.

Said plaintiff also excepts to the fourth finding of fact and to each and every part thereof.

Said plaintiff excepts to the fifth finding of fact and to each and every part thereof.

Said plaintiff excepts to the sixth finding of fact and to each and every part thereof.

Said plaintiff excepts to the following portion of the sixth finding of fact, to wit, "but that it was not binding on this defendant, Oconto City Water Supply Company."

Said plaintiff excepts to the following portion of said sixth finding of fact: "That as to this defendant complainant never had any mechanics' lien."

Said plaintiff excepts to the following portion of said sixth finding of fact, to wit: "That the issues raised by the pleadings in said Federal court as to the existence and supremacy of such lien against this defendant were the same as in this case."

Said plaintiff excepts to the following portion of said sixth finding of fact, to wit, "and that the questions therein decided are the same as are involved in this case."

Said plaintiff excepts to the following portion of said sixth finding of fact, to wit, "and that the questions there decided be-
266 came by the decree of said court *res adjudicata* between the parties hereto."

Said plaintiff excepts to the following portion of the seventh finding of fact, to wit, "and that Andrews and Whitcomb did not then think that the plaintiff had such a lien and relied upon their securities."

Said plaintiff excepts to the first conclusion of law and to each and every part thereof.

Said plaintiff excepts to the second conclusion of law and to each and every part thereof.

Said plaintiff excepts to the third conclusion of law and to each and every part thereof.

Said plaintiff excepts to the fourth conclusion of law and to each and every part thereof.

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

And because the foregoing evidence, rulings, instructions, and exceptions do not appear of record, I, the undersigned, the circuit judge who tried said action, have on due notice settled and signed this bill of exceptions, to the end that the same be made part of the record herein, this 21st day of February, 1898, and I certify that the foregoing is all the evidence offered or received upon the trial of said action.

SAM'L D. HASTINGS, JR., *Judge.*

(Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Ltd., *vs.* Oconto City Water Supply Company. Plaintiff's proposed bill of exceptions. Oconto county, Wis. Filed in office of clerk of circuit court Mar. 24, 1899. Chas. D. Post, clerk. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

267 Circuit Court, Oconto County.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED, Plaintiff,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant.

STATE OF WISCONSIN, }
County of Oconto, } *ss.:*

I, Chas. D. Post, clerk of the circuit court in and for said county, do hereby certify that the annexed and foregoing are the originals and all the papers and pleadings material to the appeal which have been filed in my office in the above-entitled cause, and the same are hereby transmitted to the clerk of the supreme court of the State of Wisconsin, at Madison, Wisconsin, pursuant to the annexed notice of appeal and in accordance with the statutes in such case made and provided.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said circuit court this 16th day of June, 1899.

CHAS. D. POST, *Clerk.*

(Endorsements:) Circuit court, Oconto county. National Foundry and Pipe Works, Limited, *vs.* Oconto City Water Supply Company, defendant. Clerk's certificate. Filed June 17, 1899. Clarence Kellogg, clerk of supreme court Wis.

268 And afterwards, to wit, on the ninth day of November, A. D. 1899, the same being the twenty-sixth day of said term, the following proceedings were had in this court in said cause—that is to say:

Oconto Circuit Court.

NATIONAL FOUNDRY AND PIPE WORKS, Appellant,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Respondent.

And now, at this day, came the parties herein, by their attorneys, and this cause having been argued by George H. Noyes, Esq., for the said appellant, and by George G. Greene, Esq., for the said respondent, and submitted, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

269 And afterwards, to wit, on the fifteenth day of December, A. D. 1899, the same being the thirty-third day of said term, judgment was rendered in said cause by this court in the words and figures following—that is to say:

Oconto Circuit Court.

NATIONAL FOUNDRY AND PIPE WORKS, Appellant, *vs.* OCONTO CITY WATER SUPPLY COMPANY, Respondent. } Opinion by Justice Marshall.

This cause came on to be heard on appeal from the judgment of the circuit court of Oconto county and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Oconto county in this cause be, and the same is hereby, affirmed, with costs against the said appellant, taxed at the sum of seventy-three and $\frac{51}{100}$ dollars ($73.51).

270 And thereupon this court, by Justice Marshall, filed its opinion in said cause in the words and figures following—that is to say:

271 STATE OF WISCONSIN:

In Supreme Court.

NATIONAL FOUNDRY & PIPE WORKS, Appellant,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Respondent.
No. 112.

Appeal from the circuit court for Oconto county.

The Oconto Water Company, a corporation organized to construct a system of water works in the city of Oconto, and to which, prior to the creation of the indebtedness hereafter mentioned, such city granted the usual franchise to construct, maintain, and operate such a system to furnish water for public and private use in such city between September 8th, 1890, and November 24th, 1890, became indebted to plaintiff for pipe which was used in such construction in the sum of $25,637.32. September 13th, 1890, the water company mortgaged its franchises and property to Andrews & Whitcomb, under which mortgage and two others subsequently executed the mortgagees loaned to the water company $64,000, which was used in constructing the water works. Plaintiff seasonably filed a petition for a lien for its claim on the water-works plant under ch. 143, R. S. Such proceedings were had in the Federal court for the eastern district of Wisconsin in an action brought by the plaintiff against the water company to enforce such lien that a decree was entered in plaintiff's favor in due form of law October 3rd, 1892. Plaintiff also obtained a judgment at law for the amount of its claim in the same court. June 17th, 1891, Andrews and Whitcomb commenced an action in the State court to enforce their mortgages, and such proceedings were duly had therein that a decree of foreclosure and sale was entered in due form of law August 13th, 1891, pursuant to which the water-works plant and the rights and franchises of the company, including all the property covered by such mortgages, were sold to the mortgagees, and thereafter the sale was duly confirmed and a deed executed and delivered in accordance
272 therewith. After the title was vested in Andrews & Whitcomb, as aforesaid, and on the 12th day of July, 1892, they transferred the property to the defendant, The Oconto City Water Supply Company, a corporation organized for the purpose of purchasing the property and obtaining the powers and privileges conferred by sec. 1788, R. S. January 11th, 1892, plaintiff commenced a creditor's suit in the Federal court, supplemental to its judgment at law against the Oconto Water Company and Andrews & Whitcomb. One of the purposes of such suit was to obtain a decree of priority of their lien claim over the title of Andrews & Whitcomb under the mortgage-foreclosure proceedings. In such action the rights of all the parties, including the right of plaintiff to a lien under the laws of this State as against Andrews & Whitcomb, were presented to the court for adjudication. The claim on the part of Andrews & Whitcomb was that they were not bound by the lien judgment, because not made parties to the suit to enforce it, and that the water-works

property was not subject to the laws of this State respecting mechanics' and materialmen's liens. On the part of the plaintiff the validity of the mortgages under which Andrews & Whitcomb claimed title was attacked, and it was further claimed that its lien was a first claim against the water company, and that it should be so adjudged in the creditor's suit. Before the case was finally determined this court decided, in Chapman Valve Mfg. Co. *v.* Oconto Water Co., 89 Wis., 264, that a water-works plant provided by a city by contract with a private corporation for the protection and convenience of its citizens is not subject to lien claims under ch. 143, R. S. The Federal court entered a decree in the creditor's suit sustaining the lien judgment, and that it was binding upon Andrews & Whitcomb as privies of the water company, the theory that they were so circumstanced being based on the fact that they were the owners of the stock of the water company when the indebtedness for which the lien was claimed accrued. The case was
273 carried to the court of appeals, where the decree, so far as adverse to Andrews & Whitcomb, was reversed, that court holding that their mortgages covered all the water company's franchises as well as the plant; that the question of the validity of the plaintiff's lien, as between them and the water company, was *res adjudicata*, but that it was not binding on, and the plaintiff had no lien as to, Andrews & Whitcomb; that, independent of the effect of the judgment upon the parties to the lien suit and their privies, plaintiff's claim was not lienable under the statutes of Wisconsin; that Andrews & Whitcomb were not privies of the water company, or affected by the lien judgment in any way whatever; that the lien claimed as to them was void, and that the title acquired by them under the mortgages was paramount to plaintiff's claim under the lien judgment. A mandate in accordance with such decision was duly filed in the lower court. Thereafter plaintiffs caused the lien judgment to be enforced in form by a sale of the water-works property by the United States marshal, a confirmation of such sale, and the issuance of a marshal's deed pursuant thereto to the plaintiff as purchaser, the deed purporting to convey all the right, title, and interest which the Oconto Water Company had in the property described in *in* the lien decree on the 15th day of September, 1890. Thereafter this action was brought to compel the defendant company to surrender the water-works property to plaintiff upon the theory that defendant, by organizing under the statute to acquire title to such property and the right to exercise all the rights, privileges, and franchises of the old corporation and taking such property with knowledge of plaintiff's lien, became a mere continuation of the old organization under another name. Judgment was prayed for against the defendant for the amount of the plaintiff's claim against the old water company, and that they be given possession of the water-works property; that defendant be enjoined from using such property, particularly the pipes furnished by plaintiff
274 which were used in its construction, unless, within a reasonable time, defendant should pay its claim. Defendant answered the complaint, and the issues thus formed were tried and

determined, the decision being to the effect that in the action in the Federal court, to which the plaintiff and defendant were parties, it was decided that plaintiff was not entitled to any lien upon the water-works property as against the title under the Andrews & Whitcomb mortgages; that the issues raised in this case were all presented in the case in the Federal court and were adjudicated adversely to the plaintiff, and that such adjudication is binding between the parties and conclusive in this action; that Andrews & Whitcomb knew, from prior to December 1st, 1890, of the facts in regard to plaintiff's claim. Judgment was rendered accordingly, and dismissing the complaint, and plaintiff appeals.

275 MARSHALL, *J.*:

Appellant's counsel mainly rely on the proposition that where one corporation goes out of existence by being annexed to or merged in another, no arrangements being made restraining the payment of the liabilities of the former, the latter will be entitled to all the property and answerable for all the liabilities. That is familiar. No need exists to go outside of this State for authority to support it. Knight *v.* Town of Ashland, 61 Wis., 233. In that case, speaking of the devolution of the liability of a town that has passed out of existence upon an existing town to which the territory of the former had been attached, it was said that the authorities are that the simple vacation of the town by legislative enactment and the attachment of its territory to another town without any direction as to the payment of the liabilities of the former rendered the latter liable for such liabilities. Other cases are to the same effect. Schriber *v.* Town of Langlade, 66 Wis., 616; Butternut *v.* O'Malley, 50 Wis., 333; Pennison *v.* C., M. & St. P. R. Co., 93 Wis., 344. However, the application of that principal to the facts of this case is not perceived. The Oconto Water Company did not go out of existence either by being annexed to or merged in another corporation. True, it went out of business and all the purposes of its organization were destroyed by the enforcement of the Andrews & Whitcomb mortgages, but not by any contract with the defendant corporation or any arrangement with it or any person or party with whom or to which it was a party by which the mere destruction of the corporation was of any benefit to such person or party, or by which they obtained any property or right not paid for at its full value by a cancellation of the mortgage indebtedness, which antedated the lien of the plaintiffs so far as released to the owners of the mortgages or the persons claiming under them. There was no merger of corporate interests or attachment of the rights of one to those of another; but one was, to all
276 intents and purposes, destroyed as an artificial body, and another corporation, new and distinct from the old one, was created, with such power as it was the *bona fide* purchaser of, under proceedings adverse to the old corporation, and which it had the right to exercise by force of the statute. A moment's consideration of the reason of the rule invoked by the plaintiff will show that it has no room to operate here. It is a rule of equity and to prevent fraud,

so when all the property of one corporation is transferred to another without other consideration than that growing out of or incidental to the consolidation, the presumption arises either that it was the intention of the parties that the successor corporation would assume the payment of the debts that were equitably a claim upon the property succeeded to, or that the transaction was a fraud on creditors and voidable as to them.

The idea is that a successor corporation receives benefit from such a succession equitably applicable to the payment of the debts of the former proprietor, and therefore, to the extent of such benefits, is liable for such debts. From that a contract liability is implied which the successor corporation cannot be heard to deny; otherwise it would be allowed to defend on the ground of such wrong-doing as of itself would void the transaction altogether as to the creditors on the ground of fraud. As said in Mt. Pleasant *v.* Beckwith, 100 U. S., 514: "The corporate property passes into the hands of its successor, and where the benefits are taken the liabilities are assumed, the rule being that the successor who takes the benefits must take the same *cum onere*, and it cannot deny that it is liable for the attendant burdens." Here, if the Andrews & Whitcomb mortgages were valid liens upon the water-works property paramount to plaintiff's claim, so that by the enforcement of the mortgages the purchaser at the foreclosure sale only obtained the benefit of the mortgage security,
277 they became possessed of no benefit that they did not fully pay for or anything that was equitably applicable to the payment of plaintiff's claim. The essential of prior equity of plaintiffs in the property, which is an absolute essential to the liability of the new owner of such property for the debts of its predecessor, does not exist, so the principle invoked does not apply.

The learned counsel for the appellant, overlooking, as it seems, the reason of the rule which makes a successor corporation liable for the debts of its predecessor, seek to apply it as broadly as the literal sense of the language of the proposition of law will permit—that is, to take in every case of a corporation that succeeds to the property of another, regardless of whether it thereby takes anything of value to which creditors have a legal or equitable right, or whether the succession is by contract and voluntary or adverse and involuntary as to the old propri-tor. To maintain that defendant is a successor corporation, within the meaning of the doctrine under *discretion*, because of having absorbed the old water company, reliance is placed on sec. 1788, R. S., which provides that "any person or association of persons which shall have or may hereafter become the owner or assignee of the rights, powers, privileges, and franchises of any corporation created or organized by or under any law of this State by purchase under a mortgage sale, * * * may, at any time within two years after such purchase or assignment, organize anew by filing articles of organization as provided in this chapter or elsewhere in these statutes respecting corporations for similar purposes, and shall thereupon have the same rights, privileges and franchises which such corporation had or was entitled to have at the time of such purchase and sale and such as are provided by these statutes

applicable thereto." That idea has not the merit of novelty. It has often been presented to this and other courts in behalf of persons circumstanced as plaintiff is, and as often the new corporation has been held free from all liabilities to the creditors
278 of the old corporation. The decisions to the effect are so numerous and so clear that we must assume that they have not escaped the notice of the learned counsel for appellant. The first instance where the question was adjudicated by this court is Vilas *v.* M. & P. du C. R. Co., 17 Wis., 497. The defendant was organized by purchasers at mortgage sales under a legislative enactment clothing the new company with all the rights and privileges of the old company. Vilas, as a general creditor, advanced the same proposition as that under consideration. The court held that such proposition was directly contrary to the whole purpose of the statute; that the legislative intent was to give full effect to the mortgage as security, while the construction contended for would destroy the security; that the proceedings under such law are adverse to the old corporate organization, which of itself distinguishes them from those that render a successor corporation liable for debts of its predecessor, and that there is no good reason why the two situations should ever be confused. That was affirmed in Smith *v.* C. & N. W. R. Co., 18 Wis., 17. In that case there was the additional element that the mortgage sale was for the benefit of the stockholders and creditors under an agreement that there should be a reorganized corporation in which the stockholders and creditors of the old company might participate. Yet the court held that the sale cut off all the rights of the old company and its creditors; that the organized company was a new and entirely independent organization, against which the creditors of the old company had no claim whatever except such as they obtained by the agreement entitling them to become stockholders in such company.

The same subject was again presented in Neff *v.* Wolf River Boom Company, 50 Wis., 585, where sec. 1788, R. S., as originally enacted in ch. 115, Laws of 1872, was considered and construed. The trial judge decided, as appellant's counsel here contended,
279 that the reorganized corporation was a mere continuation of the old company and liable for a wrong committed by it. That was reversed on appeal, this court holding that there is nothing in the statute which furnishes a reasonable ground for saying that a reorganized company, pursuant thereto, is a continuation of the old corporation; that the purpose of the law is to clothe the new company with the charter rights of the old organization, not to continue the former in any sense. The court seems to have treated the contention to the contrary as a very near approach to the absurd, as evidenced by the following language by Mr. Justice Lyon, who wrote the opinion: "If the learned circuit judge interpreted the statute correctly, we cannot see why the defendant corporation is not liable for the debts of the old company, if it is indebted. If its liability goes to that extent, the act would be inoperative and useless in most cases; for no purchasers of the assets of an insolvent corporation would take the risk of organizing under the act when to

do so would make them liable for the debts of the old corporation. We think the purpose of the act was to secure to purchasers at judicial sales the right to use and enjoy the franchises which have been conveyed to them in form" under a judgment or decree. To the same effect are Wright *v.* M. & St. P. R. Co., 25 Wis., 46; Gilman *v.* S. & F. du L. R. Co., 37 Wis., 317; Pennison *v.* C. M. & St. P. R. Co., *supra;* Menasha *v.* M. & N. R. Co., 52 Wis., 414; Memphis Water Co. *v.* Magens & Co., 83 Tenn., 37; Hoard *v.* C. & O. R. Co., 123 U. S., 222; Chesapeake & O. R. Co. *v.* Miller, 114 U. S., 176; Cook *v.* D. N. H. & M. R. Co., 43 Mich., 349; The Houston & T. C. R. Co. *v.* Shirley, 54 Tex., 125; Thornton *v.* Wabash R. Co., 81 N. Y., 462; Glenn & Pryce *v.* Statler, 42 Iowa, 107.

The foregoing are but a small part of the numerous cases in the books on the question under consideration. They show how frequently the principle, which protects the right of creditors
280 to be paid out of the corporate property against schemes worked out by contract or by legislative enactment to merge one corporation or all the property of one corporation in another, has been confounded with the circumstance of a corporation, by adverse proceedings to enforce a mortgage upon corporate property, becoming legitimately possessed of it by a sale, cutting off the rights of creditors having a junior or no lein on said property. In the former case the new possessor of the property takes that which creditors have a right to for the satisfaction of their claims; in the latter such possessor takes only that for which full value was parted with to the old company at the time the mortgage was placed on the property, pursuant to its terms. In the former circumstances the proceedings are all voluntary; in the latter, involuntary and adverse. The defendant became the *bona fide* owner, for full value, of the property of the Oconto Water Company and all the franchises possessed by it for the profitable use and enjoyment of such property. The purchaser at the foreclosure sale took title to the property with the incidental rights conferred by sec. 1788, R. S., to form a new corporation to take the same by assignment and possess the rights of the old organization. When the mortgages were given sec. 1788, R. S., became a part of them and a very material element in the value of the security. The right guaranteed by such section was as much a part of the mortgage security as the tangible property described. The theory of the appellant is that the statute clothing a corporation circumstanced as the defendant is with the right to exercise the powers, privileges, and franchises possessed by the old corporation, which it shall have acquired *bona fide* by a mortgage sale or by assignment based on a title acquired through such a sale, instead of adding to the value of a corporate mortgage covering all the property of the corporation, tangible and intangible, impairs it and may destroy it, because a new corporation can be organized with the benefits of the statute without incurring
281 the penalty of being liable for the unsecured indebtedness of the old corporation, whether before the foreclosure sale the owner of the mortgage indebtedness had a first lien on the property or not. In other words, that the statute not only operates to pre-

vent the general creditors from being cut off by the foreclosure proceedings, but transposes the parties so as to give the general creditors a claim in the property paramount to the mortgage. The statute will not admit of a construction leading to such an absurd result, even if the question were an open one, and it is not, as we have seen. The manifest purpose of it, as indicated, is to add to the value of a corporate mortgage of the kind under consideration. This is too plain to admit of serious controversy. Candor compels us to say that we do not think that the contrary theory merits the consideration we have given to it, since its fallacy is so glaringly apparent and has so often been exposed in this and other courts.

In view of the foregoing, it is not important to enquire whether the franchise to exist as a corporation possessed by the Oconto Water Company passed by the foreclosure sale to Andrews & Whitcomb and was by them conveyed te the defendant, or whether such right is included in the term "rights, powers, and privileges," used in section 1788, R. S. Counsel for the appellant rely on the affirmative of those propositions. Whether they are right or wrong is immaterial to this controversy, for, as indicated in Neff *v.* Wolf River Boom Co., *supra*, the reorganized corporation, so called, is not the old corporation revived by authority of sec. 1788, but a new organization under the general statutes governing the creation of such bodies, clothed, however, by the statute with the undoubted right to use the rights conveyed to it in form by a chain of title based on the foreclosure sale, the plain purpose of the law being to place the new organization in the same situation as the old corpo-
282 ration as regards the use of rights, privileges, and franchises derived from sovereign authority in connection with the tangible property covered by the mortgage, freed, however, from the liabilities of such corporation not, before the sale, liens upon the property paramount to the mortgage lien. We fail to find anything in any of the numerous cases to which appellant's counsel have called our attention inconsistent with this view.

It is further conceded that the maxim "*Qui sentit commodum sentire debit et onus*" (He ought to bear the burden who would derive the advantage) applies. One of the essentials to the application of the maxim is that the interest in the thing enjoyed, from which springs the duty of bearing its burdens, legally or equitably belongs to him to whom the duty is due. The duty grows out of such ownership. Another essential is that the burden must really rest on the thing and be paramount to the right of him who appropriates the advantages. The extent of the advantage is the limit of the burdens.

To satisfy the above-indicated requirements, we are told that when Andrews & Whitcomb purchased the water-works property at the foreclosure sale they knew that plaintiff had an adjudged lien thereon for the amount of their claim, good against the common debtor, and that the respondent was likewise circumstanced when it took the title therefrom; though it may be concluded that title passes to the respondent, it was subject to the lien judgment, and the respondent should not be allowed to use such property except upon condition of

paying the appellant's charge upon it. If this is good law, all a junior-lien claimant need do to acquire precedence over the prior lien is to obtain a judgment for the enforcement of it in an action to which the prior-lien claimant is not a party. We cannot agree with that proposition. The rights of Andrews & Whitcomb under this mortgage, relative to the rights of the appellant under the claim
283 for a lien on the mortgaged property, were not affected in the slightest degree by the judgment in the Federal court in the lien suit. They were not parties to it in privity with the Oconto Water Company so as to be bound as such. That seems too clear for serious controversy, and was adjudicated between the parties in the creditors' suit. So, if the appellant was not entitled to a lien on the water-works plant as against Andrews & Whitcomb, the latter derived no advantage from the foreclosure sale except that for which they gave a full equivalent by a satisfaction of the mortgage indebtedness. They took the property without any burden resting upon it; hence incurred *on* duty within the maxim which the learned counsel invoked.

Pfeifer *v.* S. & F. du L. R. Co., 18 Wis., 155, and other cases of similar character are confidently cited to our attention. The Pfeifer case involved the liability of a successor railway company to pay for land wrongfully taken by its predecessor for right of way, as a condition of being permitted by the owner to use such land for the purpose. The foundation of the claim adjudged was that the land belonged to the claimant and could not be appropriated for the use of another except on condition of rendering an equivalent therefor. Obviously, before the principle can be applied to this case, it must be demonstrated that defendant is in possession of the property which belongs to the appellant or in which it has an interest paramount to the rights of the respondent. That stands in the way of all the learned counsel's contentions. The *enormous* assumption that respondent has appropriated something which belongs to appellant seems to be an infirmity which pervades and condem-s substantially all the propositions advanced. If the property was not subject to a lien under ch. 143, R. S., and this court has so decided, and respondent is not affected by the judgment in the action in the Federal court to which its grantors were not parties, and that has been decided in previous litigation
284 between the parties to this cause, then the premises are all absent which are necessary to give effect to Pfeifer *v.* S. & F. du L. R. Co. It will not do to assume that Andrews & Whitcomb, by the legitimate enforcement of their mortgages, and respondent, by taking title from them, appropriated property belonging to appellant, and thereby reach a conclusion that respondent is liable to bear the burden of appellant's claim. That process of reasoning could not fail to lead to most illogical and absurd results. We cannot proceed logically to correct conclusions, except by demonstarting step by step the truth of minor propositions upon which such conclusions must rest. Mere assumption as to any essential premise renders the result of the reasoning of no value, and demonstrated non-existence of such premise has the same effect. That seems to

apply to all that part of the argument for a reversal upon the theory that the maxim, "*qui sentit commodum sentir debet et onus*," applied to the facts of this case.

The question of whether the trial court erred in deciding that the judgment of the Federal court is *res adjudicata* on all points upon which appellant relies to recover is presented for consideration. It is elementary that all questions appertaining to a cause of action within the issues and actually litigated or which might have been litigated are irrevocably answered by the final decree, so far as affects the parties to such action as regards the subject thereof. That, of course, includes not only the primary right sought to be enforced by the action, but matters germane to and actually involved in it. Wentworth *v.* Racine Co., 99 Wis., 26. It is conceded that under that rule it was not open for appellant in this case to litigate the question of whether plaintiff's lien judgment was binding on the respondent; but, it is said, the right of appellant to hold the respondent liable for its claim upon the ground that the latter took the property in controversy subject to its lien claim
285 was not involved in the former litigation or presented to the court or decided. It is with some difficulty, we confess, that we can follow the course of reasoning which leads to the statement of such premises as correct or the conclusion based thereon. The validity of the Andrews & Whitcomb mortgages and the title acquired through the foreclosure of them were subjects of controversy in the creditors' suit. The pleadings show that, and the opinion filed as well. If appellant was possessed of a claim upon the property, either by reason of the judgment against the Oconto Water Company or otherwise, paramount to the rights claimed under the Andrews & Whitcomb mortgages, they were entitled to have had such claim declared to them in the creditors' suit. The object sought by such suit was to obtain a decree to the effect that appellant was entitled to the property in controversy, as it stood September 15th, 1890, free from any claim of Andrews & Whitcomb or any other party to the action. That brought before the court for adjudication the nature and validity of the title obtained through the foreclosure proceedings, not only as regards whether it was affected by the lien decree against the Oconto Water Company because of Andrews & Whitcomb's connection with such company, but whether such title was subject to the appellant's claim under any circumstances. An examination of the pleadings in the creditors' suit leaves no doubt on that question, and, by reference to the published opinions of Judge Wood in the case, it appears that all the matters involved in the controversy above mentioned were actually decided. We might quote at length from such opinion, found in 76 Fed., 166, and 77 Fed., 774, conclusively establishing what is here said, but it is not deemed necessary. It is sufficient to say that, in our judgment, the decision in the creditors' suit is just as decisive that the title acquired by the fore-
286 closure sale passed to the purchasers, free and clear of any claim of the appellant, as it is that Andrews & Whitcomb were not bound by lien judgment. Appellant's counsel con-

ceded that the effect of the decree is that their claim was not a lien upon the water company's property as against the Andrews & Whitcomb mortgages. With that concession, there was nothing left undecided, as it seems, which is involved in this case. If there was no lien as against the mortgagees, the owner under the foreclosure sale did not take any benefits which belonged legally or equitably to appellants.

It is further contended that the State court had no jurisdiction to decree the foreclosure and sale under the mortgage, because prior to the commencement of the foreclosure action the Federal court had acquired judgment to enforce appellant's lien, which drew to that court all questions regarding the rights of the mortgagees. The one sufficient answer to that is, as counsel for respondent suggests, that the appellant's lien having been adjudged void as to respondent, and it being conceded or undisputed that respondent is legally in possession of the mortgage property, with at least the rights of mortgagees so circumstanced, it cannot be ousted from that possession without payment of the mortgage indebtedness, nor can it be made to pay junior liens as conditions of enforcing its primary right.

But it is not the law that the commencement of a suit in the Federal court to enforce a mechanic's or materialman's lien on property precludes the foreclosure of a mortgage on the same property in the State court. The lien action was not *in rem*, except in a qualified sense. There was no seizure of the property and no possession of it taken by the court or necessary to the lien action at any stage of it. The situation was essentially different from one where the property is in the actual custody of the Federal court. It is held, in the late case, that an action cannot be instituted in the
287 State court and proceedings had therein to the extent of disturbing such possession.

Where there is no possession other than constructive, a suit on a different cause of action may be commenced in the State court and carried to judgment and actual possession of the property obtained under it, notwithstanding the pendency of the action in the Federal court. Compton *v.* Jesup, 68 Fed., 263. That does not militate at all against the principle that where the Federal court acquires jurisdiction of a suit, such jurisdiction is exclusive as to the subject-matter thereof and property affected in its actual custody. The subject-matter of the lien suit was the enforcement of a materialman's lien under the laws of this State against the Oconto Water Company. In respect to that, the jurisdiction of the Federal court was exclusive, but it did not include any question regarding the rights of the mortgagees. Th-y were not necessary parties, were not made parties, and were not affected by the result. The subject-matter of the foreclosure action was an entirely different matter. True, Andrews & Whitcomb might have been made parties to the lien action, but they were not. The plaintiff was not obliged to make them parties, neither were they called upon to request to be made such for the protection of their rights. Such rights were in no way involved in the mere question of right of lien as against the Oconto Water Company. One may easily be led astray by questions

of conflicting jurisdiction between State and Federal courts by not keeping in mind that it is the subject of the action first commenced in the latter court, and control and disposition of property in the actual custody of such court, as to which its power is exclusive. The mere fact that the suit is pending in the Federal court on one cause of action or subject of action affecting property not in the custody of the court does not prevent the commencement or prosecution of any number of other actions between other parties on other cases or subjects of action affecting the same property, or prevent the
288 *the* property from being seized in such other actions, so long as no prior possession of the *res* by the Federal court is disturbed. Compton *v.* Jesup, *supra.* In Grumbel *v.* Pitkin, 124 U. S., 131, we have a fair type of the cases cited to our attention to support a contrary view, but an examination of it will disclose that the property was in the actual custody of the court, and that solely on that ground it was held that the court had exclusive jurisdiction. It was distinctly held that when the Federal court has possession of property under a writ of attachment, a writ may properly be issued in an action in a State court on another cause of action against the same property, and a constructive levy be made thereon by a proper notice to the United States marshal having possession thereof, and that the cause in the State court may proceed to judgment, and after the plaintiff's rights therein shall have been adjudged he may apply to the Federal court to have such rights protected in the distribution of the proceeds of the property by the latter court. Thus, it is seen that identity of subject of action or disturbance of actual possession is what limits the exclusive jurisdiction of the Federal court as applied to this case. In that view it is readily seen that the proceedings in the State court to foreclose the Andrews & Whitcomb mortgages did not conflict in the slightest degree with the jurisdiction of the Federal court to enforce appellant's lien against the Oconto Water Company.

The only other question that need be noticed is a claim that the court erred in granting affirmative relief to respondent. The theory advanced is that in the absence of a counter-claim or prayer for affirmative relief no such relief whatever can be granted. On that, Casgrain *v.* Milwaukee Co., 81 Wis., 113, is cited. The affirmative relief there involved was the reformation of a written instrument; also Weld *v.* Johnson Mfg. Co., 86 Wis., 549, where an accounting was necessary to make the defence effective; moreover, it was
289 an action of ejectment where the equitable defence was pleaded under the statute, which says that the defendant shall demand such judgment as he claims. Neither case has any bearing on the point here raised. Reynolds *v.* Stockton, 140 U. S., 254, is also cited. There the matter adjudged was entirely outside the issues made by the pleadings. The question of whether the judgment could have been this broad without a prayer for relief consistent therewith, had the issues been thus consistent, was not considered or *considered.* 11 Eng. Pl. & Pr., 868, 877, 879, is also called to our attention. There it is said that the judgment must be no broader than the issues, and that affirmative relief should not be

granted except in conformity with the pleadings, but that such relief is proper where justified by the pleadings and proof, though not prayed for. Sec. 2883, R. S., provides that the judgment may give to a defendant any affirmative relief to which he may be entitled. This court early held that under such provision a prayer for relief in the answer, though proper, is not necessary. Benedict *v.* Horner, 13 Wis., 256. "Its language," said the court, "is applicable to all issues. * * * The fact that the affirmative relief is not prayed for is not material. The facts constituting the foundation for it being sufficiently stated, that is all that is now required by law." Here the facts affirmatively adjudged in defendant's favor were pleaded as a defence. The allegations showed, if true, the paramount character of respondent's title, and they were established on the trial. The decree in form follows the issues so established in defendant's favor. It is no broader and of no more effect than a judgment of dismissal on the merits. Such a judgment would be *res adjudicata* as to all questions embraced within the issues. Amory *v.* Amory, 26 Wis., 152; Durant *v.* Essex Co., 7 Wall., 107; S. L. & C. Co. *v.* Frank, 148 U. S., 603.

The judgment granting affirmative relief on a matter properly the subject of a counter-claim and which cannot be made effective without such relief, as in case of the reformation of a written
290 contract, of course is not proper. The rule above discussed does not apply to such a case. Where, however, facts pleaded as a defence when established are effectual to defeat the plaintiff's cause of action without any affirmative relief, then a judgment formally adjudicating the existence of such facts or the effect of them is always proper. A judgment of dismissal of the plaintiff's complaint covers the ground, but the mear formal judgment, expressing upon its face the effect of the adjudged facts, goes no further and may be considered a correct, if not the better, practice. The judgment appealed from is in strict conformity with the foregoing. The trial court found the facts and as the legal effect thereof decided that plaintiff was not entitled to any lien on the property in controversy; that defendant was the owner and holder of the property, free and clear of any claim of the plaintiff; that plaintiff was not entitled to any relief in the action, and that the defendant was entitled to a judgment on the merits dismissing the complaint and the action. The judgment entered, in addition to the formal dismissal of the complaint and action, adjudged the effect of the facts as contained in the trial court's conclusions of law upon which the entry of the judgment of dismissal was directed.

The foregoing leaves nothing further to be said. The record appears to be free from error. The judgment must be affirmed.

By the COURT: Judgment affirmed.

291 NATIONAL FOUNDRY AND PIPE WORKS, Plaintiff in Error,
vs.
OCONTO CITY WATER SUPPLY COMPANY, Defendant in Error.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause.

That the original writ of error, the petition therefor, the citation, with its service endorsed thereon, the assignment of errors, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

Seal Supreme Court of Wisconsin.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this 17th day of February, 1900.

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No., 17,659. Wisconsin supreme court. Term No., 216. The National Foundry and Pipe Works (Limited), plaintiff in error, *vs.* Oconto City Water Supply Company. Filed March 1st, 1900.

No. 216.

Brief of Noyes, for P. E.

FILED
MAR 18 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 18, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error.

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

GEO. H. NOYES,

Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error.

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

The case comes here on writ of error to the Supreme Court of the State of Wisconsin. The action was brought in the circuit court of the state, for the posession and use of a certain water plant in the city of Oconto, and to enjoin the defendant from using the same, or any part of the material furnished for such plant, unless the defendant should pay to the plaintiff the amount adjudged due to it for materials which it furnished in the construction of the plant and for which it obtained a mechanic's lien decree against the Oconto Water Company. (Record, pp. 17-25.)

It appears from the admissions in the pleadings and the proofs offered that the plaintiff in error made a contract on the 28th day of August, 1890, with the Oconto Water Company, a corporation of Wisconsin, to furnish the iron pipe necessary to be used in the construction of its water works plant in the city of Oconto, and that the delivery of such pipe commenced in the city of Oconto on the 8th day of September, 1890, and the work of construction on the plant began on the 15th day of September, 1890. On the 28th day of January, 1891, the plaintiff in error filed its claim for a lien upon the

plant, and on the 30th day of January, 1891, its bill of complaint in the United States Circuit Court for the Eastern District of Wisconsin in equity for the purpose of foreclosing its lien against the plant, making the Oconto Water Company the sole defendant. The defendant contested the case on the ground among others, that a mechanic's lien could not be enforced against the property of a water company. A decision was made in favor of the complainant, which, upon appeal by defendant, was affirmed by the Circuit Court of Appeals.

Oconto Water Co. vs. National Pipe Works, 18 U. S. App. 380.

A decree was rendered on the 3rd day of October, 1892, adjudging the amount due to the plaintiff in the sum of $25,637.32, and that such sum was a lien "upon the well, buildings, machinery and the entire water works plant of said defendant in the city of Oconto, Wisconsin, and upon all the right, title and interest which the defendant Oconto Water Company had in and to the premises hereinafter described from and after the date of the commencement of the construction of said well, buildings, machinery and water works plant upon which said lien is claimed, to-wit, the 15th day of September, 1890, or which said defendant or any and all persons claiming under it have since acquired therein."

It was further decreed:

"That the aforesaid well, buildings, machinery and entire *water-works plant* and all the aforesaid right, title and interest of the said defendant or of any person claiming under it in and to the premises upon which said plant is located, hereinafter described, and the *franchise of maintaining and operating the said plant for the uses to which it is devoted by the law of the defendant's incorporation as an entirety*, be sold at public auction by or under the direction of the marshal of this court; that said marshal give public notice of the time and place of such sale in the manner provided by the statutes of the state of Wisconsin for the sale of real estate on execution, and that such sale be absolute without redemption; that said marshal make, execute and deliver to the purchaser or purchasers, on compliance with the terms of such sale, a deed or deeds of the property and premises so sold, setting forth the property and land so sold and the sum paid therefor, and that *he bring the proceeds of such sale*, after deducting the amount of his fees and expenses of such sale, *into the registry of this court for distribution among all who may show right thereto* and *subject to the order of the court thereon*; that said marshal make a report

of such sale and file the same with the clerk of this court within ten days from the date of the sale.

It is further ordered, adjudged and decreed that after the filing of said report of sale and the confirmation thereof the defendant, Oconto Water Company, and all persons claiming under it, or any or either of them, be, and they are, and each of them is hereby forever barred and foreclosed of all right, title, interest and equity of redemption in and to said premises so sold, or any part thereof."

(Here follows a description of the real estate mentioned.) (Record p. 19.)

Pursuant to the terms of such decree, the marshal made sale of the property and franchises mentioned therein on the 23rd day of August, 1897, and on the 27th day of August, 1897, executed and delivered to the plaintiff in error a deed of the property and franchises so sold, which sale, deed, and report of the marshal were duly confirmed by the court on the 28th day of August, 1897. (Record p. 15.)

The marshal's deed conveyed to the plaintiff in error the well, buildings, machinery and entire water works plant of the Oconto Water Company, and all the right, title and interest which said company, or any person claiming under it, and the premises upon which the plant was located, and the franchise of maintaining and operating the plant for the uses to which it was devoted by the law of the incorporation of the company, as an entirety, together with all the right, title and interest which the Water Company had in and to the premises on, from and after the 15th day of September, 1890, or which the Water Company or *any and all persons claiming under it have since acquired*, the real estate upon which the well, buildings and machinery are located being specifically described in the deed. (Record pp. 20-21.)

On the 17th day of June, 1891, S. D. Andrews and W. H. Whitcomb commenced an action in the state court, to-wit, the Circuit Court of Oconto County, against the Oconto Water Company, sole defendant, praying for a judgment against the defendant for the amount of advances made by them under two separate instruments of contract or mortgage and that the amount of such judgment "be decreed to be a lien upon the securities assigned and pledged by the defendant to the plaintiffs in accordance with the provisions of the contracts and agreements between them of date September

13, 1890, and March 13, 1891," and that the same be sold to pay the amount of such judgment. (Record pp. 147-159.)

The so-called mortgage dated September 13, 1890, was not executed and delivered so as to go into effect until on or about the 18th day of September, 1890, *subsequent to the date of the commencement of the mechanic's lien of the plaintiff in error.* (Record pp. 16, 23, 44, and 45.)

Such mortgage dated September 13, 1890, purported to transfer to Andrews & Whitcomb "all the rights, privileges, immunities, franchises and powers, of whatsoever name or nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of the city of Oconto and approved by the mayor of said city on the 9th day of July, A. D. 1890, said ordinance being ordinance No. 153 of said city and being entitled 'An ordinance providing for a supply of water to the city of Oconto, Wisconsin, and its inhabitants, and authorizing the Oconto Water Company, its successors and assigns, to construct, operate and maintain water works therein,'" as security for the performance by said company of its agreement to repay to Andrews & Whitcomb such moneys, not exceeding forty thousand dollars ($40,000) as they should thereafter advance for the purpose of constructing the water plant. (Record pp. 101-104.) As additional security for the repayment of such sums, the Oconto Water Company agreed to issue to Andrews & Whitcomb its entire one hundred thousand dollars ($100,000) of capital stock and one hundred thousand dollars ($100,000) of its first mortgage bonds, secured by a deed of trust on the water works and franchises of the company. There was no provision covering after-acquired property or rights. (Record p. 102.)

The agreement or so-called mortgage of March 13, 1891, was, pending the mechanic's lien foreclosure suit, executed by the Oconto Water Company to Andrews & Whitcomb to secure additional advances for the construction of the plant not exceeding twelve thonsand dollars ($12,000), such advances "secured by the securities now held and possessed by said first party as collateral to the loan made under said contract of September 13, 1890." (Record pp. 116-119.)

Judgment was entered by default in such action in the state court on the 13th day of August, 1891, in which, among

other things, it was adjudged that the plaintiffs had a lien upon the property described in the complaint and covered by the two contracts or mortgages, consisting:

1st. Of all the rights, privileges and franchises granted by the ordinance of the city of Oconto,

2nd. Of the $100,000 of capital stock,

3rd. Of $100,000 of first mortgage bonds,

and ordering that the referee named make sale of such property and that such sale and its confirmation should vest in the purchaser "the absolute legal title in and to all of the property so sold, free and clear of all rights, claims, or equity or equities of redemption of the defendant and *of all persons whomsoever claiming by, through or under said defendant subsequent* to the acquirement by the plaintiffs of their rights, interests, and claims under the contracts between them and the defendant set forth in the complaint herein." (Record p. 162.) Sale was made of said property by the referee on the 12th day of September and the referee reported to the court that he had "given to said plaintiffs as purchasers of the said property at such sale an instrument or bill of sale in writing," which bill of sale purported to transfer to Andrews & Whitcomb the ordinance rights, the stock and bonds described in the judgment. (Record pp. 124-126.)

On the 29th day of September the court ordered that the report of the referee be confirmed. (Record p. 127.)

The complaint of the plaintiff in error in the action at bar alleged:

> "That by virtue of said mechanic's lien decree and said sale and said marshal's deed, this plaintiff became and now is the owner and holder of all the right, title and interest which said Oconto Water Company had or has since acquired in and to said water plant and all the property and franchises belonging to or connected therewith, on and since the 15th day of September, A. D. 1890, which *title* to said plant, said plaintiff alleges, *is prior to any lien upon or title to said plant now or at any time held or acquired by said defendant.*" (Record p. 15.)

Said complaint further alleged that after the purchase by Andrews and Whitcomb under their foreclosure judgment,

> "they entered into possession of said entire water plant including the pipe so furnished by the said plaintiff to said Oconto Water Company, and so continued in possession thereof until, as this plaintiff is informed and believes, on or

about the 25th day of July, A. D. 1892, when the said Andrews and Whitcomb transferred to said defendant all their right, title and interest in the said ordinance rights and franchises so purchased by them under said judgment of foreclosure and sale, and thereupon said defendant took possession of said entire water plant or system so constructed by said Oconto Water Company, including the pipe furnished by this plaintiff to said Oconto Water Company, and has since continued the possession and use and received the rents, issues and profits of said plant and of said pipe as a part thereof, and is now in possession and use of all of the same." (Record p. 16.)

The complaint further alleges that the Oconto City Water Supply Company was organized as a corporation about the 7th day of July, A. D. 1892, under and pursuant to the provisions of Section 1788 of the Revised Statutes of Wisconsin, for the express and only purpose, as stated in its articles of organization, to-wit:

"For the purchase of S. D. Andrews and W. H. Whitcomb, both of the village of Norway, Oxford County, in the state of Maine, and of enjoying, maintaining and operating all of the rights, powers, immunities, franchises and property of every kind, name or nature, both real and personal, acquired and now owned and held by them under and by virtue of a decree of foreclosure and sale, made, rendered and entered in the Circuit Court of Oconto County, state of Wisconsin, on the 13th day of August, A. D. 1891." (Record pp. 13-14).

The complaint further alleged that Andrews and Whitcomb paid only a few dollars to defray expenses of sale upon their bid at the sale under their foreclosure judgment but were credited thereon the amount adjudged due them under their mortgages or pledges, and that upon the sale by Andrews and Whitcomb to the defendant there was nothing paid in cash but Andrews and Whitcomb received, in consideration of their conveyance, only capital stock of the defendant as provided in its articles of incorporation. (Record p. 17.)

The answer of the defendant consisted substantially of admissions of all the allegations of the complaint, except that it denied that the plaintiff was the owner or holder of any right, title or interest in or to the water plant or any pipe constituting any part of the same, and that it had availed itself of any property of the plaintiff which had not been paid for. It admitted entering into the possession and use of the

plant and alleged that it owned and controlled the same. (Record pp. 22-24.)

An amendment to the answer, permitted by the court, alleged as an estoppel by *res adjudicata* "that on or about the 5th day of October, 1896, a judgment was rendered in an action pending in the United States Circuit Court of Appeals for the Seventh Circuit, wherein the plaintiff in the lien decree mentioned in the complaint was plaintiff and the defendant in said decree and said S. D. Andrews, W. H. Whitcomb, The City of Oconto, this defendant and others were defendants, whereby it was adjudged that said lien decree was of no effect against this defendant or said Andrews and Whitcomb; that as to this defendant and said Andrews and Whitcomb and all of the world except the defendant in said decree the plaintiff had and there could be no lien on the premises and property described therein and in said decree; that this defendant and Andrews and Whitcomb purchased, held and owned said premises and property by claim and title paramount and free and clear of any claim or lien of said plaintiff, and that by the laws and policy of Wisconsin, under which the plaintiff claimed said lien and under which it existed, if at all, there was and could be no lien; that said determination is reported in volume 76 of the Federal Reporter on pages 166 to 176, and was adhered to by said court in volume 77 of said Reporter, at pages 774 to 778; that thereupon said court issued its mandate therein to the trial court, viz., the United States Circuit Court for the Eastern District of Wisconsin, accordingly, and, upon the same being there received and filed, judgment in accordance therewith was on the 29th day of July, 1897, duly rendered and entered in said court, which judgment has never been appealed from, modified or altered." (Record pp. 27-28.)

Upon the trial of this action under such issues (1) the court found the facts in reference to the proceedings to foreclose the mechanic's lien, the sale of the property under the decree to the plaintiff in error the deed and confirmation af sale, and also the foreclosure proceedings in the state court instituted by Andrews and Whitcomb, the sale under the judgment therein, the deed, the bill of sale of the franchise, stock and bonds covered thereby and the taking possession by them of the entire water works plant.

It was further found that after the 1st day of December, 1890, Andrews and Whitcomb knew that the plaintiff in error was furnishing the pipe used in the construction of the water plant and had not been paid for the balance remaining due on account thereof, and that on January 13, 1891, they were

informed that the plaintiff claimed a lien on the plant for such pipe. (Record p. 32.) Upon this point, it appeared in an answer of Andrews and Whitcomb introduced on the part of the defendant, that public notice was given on behalf of the plaintiff in error at the sale under the judgment in the state court at which Andrews and Whitcomb became the purchasers, that it claimed a lien upon the property of the Water Company paramount to any rights of Andrews and Whitcomb therein. (Record p. 96.)

(2) The court further found that in the suit instituted by the plaintiff in error in the Circuit Court of the United States against Andrews and Whitcomb, the defendant in error and others plead as *res adjudicata*, the decree of the Circuit Court was reversed by the Court of Appeals and thereupon a final decree upon rehearing was entered on the 29th day of July, 1897, in accordance with the mandate of the Court of Appeals, which decree has never been appealed from, modified or altered. (For such decree see Record p. 140-146.)

> It was further found that in and by such decree "it was decided that the said mechanic's lien decree of said complainant was binding on the said Oconto Water Company, but that it was not binding on this defendant, Oconto City Water Supply Company; that as to this defendant, complainant never had any mechanic's lien; that the issues raised by the pleadings in said Federal Court as to the existence and supremacy of such lien against this defendant were the same as in this case, and that the questions there decided are the same as are involved in this case, and that the questions there decided became by the decree of this court *res adjudicata* between the parties hereto." (Record p. 32.)

As *conclusions of law*, the court found:

1st. That the plaintiff has not and *never had any lien on the water works plant and property* upon which it claims such lien.

2nd. That the defendant holds and owns said plant and property by claim and *title paramount and free and clear of any lien of the plaintiff*.

3rd. That the plaintiff is not entitled to *any* of the relief demanded in the complaint as amended or otherwise.

4th. That the defendant is entitled to judgment on the merits, dismissing the complaint and action. (Record p. 32.)

Due exceptions were taken on behalf of the plaintiff to present the errors assigned. (Record p. 33).

The judgment entered provided:

"That the plaintiff has not and *never had any lien on the water works plant* and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and *title paramount to and free and clear of any claim or lien of the plaintiff;* that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise." (Record p. 36.)

The trial Judge held, as appears from the opinion filed by him, that "the facts are that under the laws of Wisconsin the plaintiff has no lien. The only claim of lien is under a statute of Wisconsin, which gives no lien."

"The plaintiff never had any lien. Such is the settled law of this state, and the judgment in the case in the Federal Court is proof conclusive on the question." (Record pp. 34-36.)

The opinion filed in the Supreme Court, after discussing other questions, says:

"It is further contended that the state court had no jurisdiction to decree the foreclosure and sale under the mortgage, because prior to the commencement of the foreclosure action the Federal Court had acquired jurisdiction to enforce appellant's lien, which drew to that court all questions of the rights of the mortgagees."

The opinion then proceeds to consider this question and concludes that the commencement of a suit in the Federal Court to enforce a mechanic's lien on property does not preclude the foreclosure of a mortgage on the same property in the state court. The court said:

"The lien action was not *in rem* except in a qualified sense. *There was no seizure of the property and no possession of it taken by the court or necessary to the lien action at any stage of it.* The situation was essentially different from one where the property is in the actual custody of the Federal Court."

"The mere fact that the suit is pending in the Federal Court on one cause of action or subject of action affecting property not in the custody of the court does not prevent the commencement or prosecution of any number of other actions between other parties on other cases or subjects of action affecting the same property, or prevent the property from being seized in such other actions, so long as no prior possession of the *res* by the Federal Court is disturbed."

"Thus it is seen that identity of subject of action or disturbance of *actual* possession is what limits exclusive jurisdiction of the Federal Court as applied to this case. In that view it is readily seen that the proceedings in the state court to foreclose the Andrews and Whitcomb mortgages *did not conflict in the slightest degree* with the jurisdiction of the Federal Court to enforce appellant's lien against the Oconto Water Company." (Record pp. 183-184.)

Another question decided by the Supreme Court was the "claim that the court erred in granting affirmative relief to respondent." It was decided that under the answer of the respondent, the trial court was justified in granting affirmative relief in its judgment to the extent of the decision in the Federal Court decree, to-wit: "That the plaintiff has not and *never had any lien* on the water works plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by a claim and *title paramount to and free and clear of any claim or lien of the plaintiff.*" (Record pp. 184-185.)

The court in its opinion further stated that the respondent "is *legally* in possession of the mortgage property with at least the rights of mortgagees so circumstanced" and that it could not be ousted from that possession without payment of the mortgage indebtness, "nor can it be made to pay *junior* liens as conditions of enforcing its *primary* right." (Record p. 183.)

Assignments of Error.

The assignments of error are found in the record on pages 5-9. Not intending to waive any by omitting to set them out here in full, they are substantially as follows:

1st. A title and right to the franchises and property conveyed to the plaintiff in error upon the sale and deed of the United States Marshal under the mechanic's lien decree of October 3, 1892, in the United States Circuit Court for the Eastern District of Wisconsin, which sale was confirmed by the court, were denied by the Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Oconto County. (See Assignments of Error Nos. 1, 2, 3, and 4, Record pp. 5-6.)

2nd. The judgment of the Circuit Court of Oconto County, affirmed on appeal by the Supreme Court of the State of Wisconsin, denied to the plaintiff in error *any right*

or title to the property covered by said mechanic's lien decree and adjudged that the defendant in error holds and *owns said property by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error.* (See Assignments of Error 5 and 7, Record pp. 6-7.)

3rd. The Supreme Court of the State of Wisconsin, affirming the judgment of the Circuit Court of Oconto County, *refused to give to the plaintiff in error the possession and use of the property covered by such marshal's deed* and refused to enjoin the defendant in error from occupying, possessing or using the same or any of the material furnished by the plaintiff in error, being a part of the water plant operated by the defendant in error, and refused to enjoin the defendant in error from occupying or using such plant or said pipe, unless within a reasonable time the defendant in error should pay to the plaintiff the amount due under its said mechanic's lien decree. (See Assignment of error No. 8, Record p. 7.)

4th. The Supreme Court of Wisconsin decided that the United States Circuit Court for the Eastern District of Wisconsin did not have and acquire exclusive jurisdiction of the subject matter of the suit in which the plaintiff in error acquired its title and right to the property under its marshal's deed and that said action did not draw to said court all questions regarding the rights and claims of all parties having claims against said property, and further decided that the Circuit Court for Oconto County, State of Wisconsin, took and acquired jurisdiction in the proceedings instituted in said court by Andrews and Whitcomb against the Oconto Water Company to foreclose their mortgages upon the same property and to render a decree of foreclosure in such suit and to order a sale of said property, and to confirm referee's report of said sale, and to give legal right, title and possession to Andrews and Whitcomb, the purchasers at the said sale under said foreclosure proceedings. (See Assignment of Errors No. 9, Record p. 7.)

5th. The Supreme Court of the state of Wisconsin decided that the United States Circuit Court for the Eastern District of Wisconsin, in the action brought by the plaintiff in error to foreclose its mechanic's lien, did not acquire exclusive jurisdiction of the *res* in said suit, because it only took *constructive*

possession of the *res* and did not have the *actual custody* thereof, and that exclusive jurisdiction over the subject matter of said suit did not obtain because there was no disturbance of the *actual* possession of the *res* in Andrews and Whitcomb instituting their foreclosure proceedings and selling the property under the judgment therein. (See Assignment of Error No. 10, Record p. 7.)

6th. The Supreme Court of the State of Wisconsin granted affirmative relief to the defendant in error under the pleadings in this action, and beyond the issues herein and the issues in the suit in the Federal Court, by adjudging that it holds and owns the property by title paramount to and free and clear of any claim or lien of the plaintiff in error. (See Assignment of Errors No. 11, Record p. 7-8.)

7th. The Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Oconto County, decided against the title, right and privilege of the plaintiff in error, which it claimed under the authority exercised and granted to it by the mechanic's lien decree, dated October 3, 1892, in that said state court decided that the decision in the action commenced in the Circuit Court of the United States for the Eastern District of Wisconsin, wherein the plaintiff in error was complainant and the said defendant in error, and Andrews and Whitcomb and others were defendants, and the issues raised by the pleadings and therein determined were the same as are involved in this cause, and that such decision was *res adjudicata* in this case between the parties. (See Assignments of Errors No. 12, Record p. 8.)

8th. The Supreme Court of the State of Wisconsin decided that by virtue of the final decree entered in the United States Circuit Court for the Eastern District of Wisconsin, dated July 29, 1897, the plaintiff in error did not hold or own said property by title paramount to that of the defendant in error, but that the defendant in error, under and by virtue of such decree, holds and owns said property by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error. (See Assignments of Error Nos. 13, 14, and 15, Record pp. 8-9.)

9th. The state court construed the mechanic's lien foreclosure proceedings invalid, and deprived the plaintiff in error

of the *vested interest* in and title to the property obtained by it under its decree and marshal's deed by holding that such title could be divested by a subsequent decision of the Supreme Court of the State of Wisconsin construing the mechanic's lien statutes in a manner different from the construction which had been placed upon them at the time of the making of the contract with the plaintiff in error and the decree recognizing and enforcing its lien thereunder. (Assignment of Error 16, Record p. 9.)

ARGUMENT.

I.

The Writ of Error Will Lie to this Court.

(1) The state court failed to recognize the validity of, and to give due effect to, the decree of the United States Circuit Court for the Eastern District of Wisconsin under and by virtue of which the plaintiff in error acquired and claims its title to the property in question, thus presenting a federal question.

DuPasseur vs. Rochereau, 21 Wall. 130.
Embry vs. Palmer, 107 U. S. 3.
Crescent Live Stock Co. vs. Butchers' Union, 120 U. S. 141.
Pittsburg Ry. Co. vs. L. & T. Co., 172 U. S. 493.
Green Bay Canal Co. vs. Paper Co., 172 U. S. 58.
Hancock Nat'l Bank vs. Farnum, 176 U. S. 640.
Avery vs. Popper, 21 Sup. Ct. Rep. 94.

The state court, in the opinion filed, recognized that its decision was based upon the ground of the federal question involved, and that this was essential to sustain its judgment. If the state court had no jurisdiction to sell and transfer the title and possession of the *res* over which the federal court had acquired prior jurisdiction, the judgment of the state court cannot be sustained. This question of jurisdiction was raised and specifically considered at length in the opinion of the court filed (Record pp. 183-184). It was considered necessary to the determination of the issues involved regardless of the question of *res adjudicata* discussed in the opinion. (Record p. 182.) Consequently it cannot be claimed that the judgment of the

state court was based upon a question sufficient to sustain it, not involving a federal question, within the doctrine of

Eustis vs. Bolles, 150 U. S. 361.

Pierce vs. Somerset Ry., 171 U. S. 640.

(2) The state court gave *undue* effect to the judgment of the state court under which defendant in error claimed title; and also gave *undue* effect to the decree of the federal court under which defendant claimed its right by *res adjudicata*. Whether the defendant in error obtained such rights or title or lawful possession as it claimed by virtue of such judgment or decree is a federal question which this court will review.

Reynolds vs. Stockton, 140 U. S. 254.

See also cases above cited.

The plaintiff in error is not estopped to assert its title to the property sold under the mechanic's lien decree, if as we contend, due effect and due faith and credit only are given to the decree plead as *res adjudicata* on the question of such title. "Both the parties therefore rely upon rights under federal authority and as the right of plaintiff in error was denied by the court the writ of error lies."

Factor's Ins. Co. vs. Murphy, 111 U. S. 738-41.

II.

The answer of the defendant in error does not raise the question of the invalidity or binding effect of the mechanic's lien decree or the title obtained thereunder by virtue of the sale, marshal's deed and the confirmation thereof by the Court.

There is no allegation in the answer that the mechanic's lien decree of the plaintiff in error was void for want of jurisdiction of the parties or of the subject matter, or because it was obtained by fraud or collusion, or that it was entered for a larger amount than was due, *or that it was not authorized by the mechanic's lien statute*, or that it was in any respect illegally or erroneouly entered. In other words, no issue was raised by the pleadings as a basis for an attack upon such decree collaterally on these grounds or any other grounds.

Conceding for the argument that the defendant in error, as a stranger to the decree, was not bound by it and had the right

to attack it for any reason in this collateral suit, it could only do so by proper allegations in its answer setting forth the grounds of such attack and then submitting affirmative proofs in support of its allegation. Proofs tending to support such allegations, if any be found in the record, were inadmissible and may be disregarded. (*R. R. Co. vs. Bradley*, 10 Wall., 299-303.) The admissions in the answer were sufficient to support a decree in favor of the plaintiff in error unless its right thereto be barred under the remaining portion of the answer setting up a former adjudication supported by the proofs offered in evidence to sustain such allegation. Portions of a record in a former action were offered in evidence to support the plea of *res adjudicata*, and this being its sole legitimate purpose the contents of the same are not to be considered as evidence for any other purpose. They cannot be used as affirmative evidence of the invalidity or nugatory effect of the plaintiff in error's title.

Upon the pleadings therefore the title of the plaintiff below stood unimpeached and admitted.

III.

The plaintiff in error proved title to the property and franchise of the Oconto Water Company by the record, marshal's deed and order of confirmation in the suit brought to foreclose its mechanic's lien.

This record and deed were admissible for the purpose of establishing such title, since both plaintiff in error and defendant in error traced their respective titles to the property to the same source, to-wit: the Oconto Water Company.

Hewitt vs. Butterfield, 52 Wis. 384.

> "It is true that, in general, judgments and decrees are evidence only in the suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate; without estblishlishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances to reject the proof of the decree would be, in effect, to

declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta.*"

Barr vs. Gratz's Exrs., 4 Wheat, 220.

Bandin vs. Raliff, 1 Mart., U. S. (La.), 165, (14 Am. Dec., 181).

"The authenticity of the record was not disputed, and if it had any legal bearing whatever on the title of the plaintiff, the defendants, who had as yet shown no title, can not object to the muniments of plaintiffs' title, when offered in evidence, whether they be deeds, wills, or partitions, 'because they are *res inter alios acta*'."

Webb et al. vs. Den., 17 How., 576, p. 579.

"It becomes evidence, not only of the rendition of the judgment, but of its *legal effect.*"

2 Jones on Evidence, §607.

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 141-157-160.

IV.

The mechanic's lien, decree, sale, marshal's deed on sale and order of confirmation were conclusive not only as against the Oconto Water Company, but as against the defendant in error, unless attacked for want of jurisdiction in the Court or for fraud or collusion.

No such defense was raised by pleading or by proof.

Not having been so attacked, the record was conclusive as against the defendant in error of the fact and amount of the indebtedness of the judgment debtor and of the lien of the plaintiff in error for the debt as established in the decree and the acquiring by the purchaser at the sale of all the right, title and interest which the Oconto Water Company had in and to the premises on and after September 15, 1890.

Candee vs. Lord, 2 N. Y., 269, 51 Am. Dec., 294.

1 Black on Judgments, §260.

2 Black on Judgments, §605.

Freeman on Judgments, §335, 418.

Wells res Adjudicata, pp. 150-1.
Bigelow on Estoppel (5th Ed.), 150-2.
Lauman's Appeal, 8 Pa. St., 473-7.
Hall vs. Spaulding, 40 N. J. L., 166.
Naylor vs. Mettler, 11 At. Rep., 859 (N. J.).
Swiggart vs. Harber, 4 Scam. (Ill.), 364.
Oakes vs. Williams, 107 Ill., 154.
Pickett vs. Pipkin, 64 Ala., 522.
Sidens vs. Parker, 52 Me., 481-5.

If the court had jurisdiction of the subject matter and the parties, it had jurisdiction to decide wrong in the interpretation of the statute, but, however erroneous the court may have made the judgment, it is binding on all who may attack it collaterally.

U. S. vs. Insley, 150 U. S., 512.
Ehrsam vs. Smith (Kans.), 60 Pac. Rep., 740.
Andrews vs. Foundry & P. W., 46 U. S. App., 619-22.

While this rule of the conclusive effect of a judgment or decree is supported by the weight of authority, there are cases which hold that upon proper allegations or objections an inquiry may be made collaterally as to the *amount and character* of the claim upon which the judgment sought to be impeached was entered so as to overcome its *prima facie* effect when offered in evidence.

In *McCoy vs. Quick*, 30 Wis., 521, the answer averred that a mechanic's lien judgment through which the plaintiff claimed title to the property had been entered upon an indebtedness *which had been theretofore fully paid*, and that only a small part of the material furnished by the judgment creditor for which he claimed a lien had been *actually used* in the erection of the structure upon the property. Testimony was offered in support of these allegations in the answer, which testimony the court rejected. It was held that the lien judgment was not conclusive upon the defendants, who were not parties to the action, but that they might show the facts set up in their answer, as a contrary holding "would open a wide door for the perpetration of most flagrant frauds."

But the court laid down the further rule as follows:

"We think the lien judgment is *prima facie* evidence in this action of the extent and amount of the plaintiff's lien on the premises, in the same manner that a mortgage on the premises (had one been given), executed by Doering (owner) to the plaintiff, and recorded June 27, 1868, would be *prima facie* evidence of the extent of the lien thereby created, as against the defendants or any other subsequent purchasers or encumbrancers of the same premises. Indeed, it seems to us that the effect of the lien judgment is the same, as against these defendants, as would have been the effect of a mortgage on the same premises for $600, duly executed by Doering to the plaintiff, and recorded June 27, 1868, (the date of commencement of the lien adjudged.) In the one case the lien is created, or at least vitalized, by the judgment of the court, and in the other it is created by the act of the parties. In either case it is only a lien, and there seems to be no good reason for holding that there is any difference in the two cases, as regards the rights of subsequent purchasers, to contest the validity or amount of the lien, or to redeem therefrom."

So *Hassall vs. Wilcox*, 130 U. S., 493, presented a somewhat similar question, although that case is clearly distinguishable from the case at bar in the following respects: In that case the mechanic's lien was *subsequent* to the mortgage, while in this case the lien is *prior* to the mortgages.

In that case the judgment declaring the lien was entered by *confession under power of attorney*, while in this case the defendant appeared, interposed an *answer*, raised all questions which could possibly be urged against the amount, character and validity of the claim and lien, including the question now raised, and the judgment entered establishing the lien was upon appeal affirmed.

In that case objections were duly made to the allowance of the lien on the ground (1) that the judgment in favor of the lien claimant "was obtained by *fraud and collusion*"; (2) that the note upon which the judgment was entered was without consideration and *fraudulent*, and (3) that for the purpose of defeating the lien of the mortgage the lien claimant *falsely* represented that the claim was for services and amounts advanced which entitled the lien holder to a lien prior to all others, whereas in fact there had been no services performed which entitled him to any such lien. The court below, notwithstanding these objections, held that testimony was not

admissible in proof of the objections filed to the lien, but that the judgment was conclusive evidence as against the mortgagees. This court held that as the claim of the mechanic's lien creditor originated after the mortgage was made, the mortgagees had the right to "compel him to prove affirmatively in that (Circuit) court the existence and priority of his lien under the statute of Texas." The lien claimant undertook to do so and the master reported that the note on which the judgment was predicated included certain amounts not secured by a lien under the statute, and that he had no lien prior to the mortgage. The Circuit Court sustained the objections filed by the lien claimant and awarded him a prior lien for the full amount of his judgment. This court said: "We do not think the evidence before the master sustained the lien for the whole amount of that note," and further said that the proceedings in the state court could not be sustained as one strictly *in rem* wherein it is essential that constructive notice to adverse claimants to appear and maintain their rights is essential before a judgment can operate even as *prima facie* evidence, citing *Windsor vs. McVeigh*, 93 U. S., 274.

In the case so cited it was held that a judgment was not binding in proceedings of confiscation instituted against the owner, in which he was required to appear and plead, and upon his putting in an appearance and offering to plead he was not allowed to do so because of his residence in a state in rebellion. It was held that the judgment was *void for want of jurisdiction*, as the court could not proceed against the owner after he had been refused the right to appear and have his day in court to contest the claim made against the property.

In the *Hassall vs. Wilcox* case, the decree of the court was reversed and the cause remanded to the court below with direction to allow a re-examination of the claim of the mechanic's lien creditor on the same and further proofs, if desired. The rule in that case does not differ from the doctrine in *Candee vs. Lord, supra*, and other cases cited, because the attack by due pleadings was made on the judgment as being void for fraud and collusion. In the case at bar no such attack is made by the pleadings or otherwise.

And so in *Southern Ry. Co. vs. Bouknight* (Cir. Ct. App., 4th Cir.), 70 Fed. Rep., 442, Chief Justice Fuller, delivering

the opinion, held that a judgment roll was admissible in evidence against the objections of mortgagees not parties thereto, "not simply as establishing the fact of its rendition, but as proof of when the action was brought, what for, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than *prima facie* against the mortgagee in respect of them."

He further said:

"The mortgagee was not, and could not have been, made a party to that action at law; nor is this intervention a proceeding against the mortgagee to recover over *in personam*. To what extent third parties may go in impeaching judgments collaterally need not be discussed. There is no pretense here of want of jurisdiction, or of fraud, collusion, or gross neglect in obtaining the judgment, or of any irregularity invalidating it. The only way in which the judgment was questioned was by exceptions to the master's report, which raised objections to its admission in evidence, to its sufficiency as proof of the allegations of the petition, to the award of priority, and that the master erred in not reporting that Bouknight, on the face of his petition, was guilty of contributory negligence, and not entitled to recover. The date of the mortgage appearing, the judgment record was sufficient to make out petitioner's case, if admissible in evidence; and we are clear that it was admissible under the statute, not simply as establishing the fact of its rendition, but as proof of when the action was brought, what for, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than *prima facie* against the mortgagee in respect of them, and that is enough to dispose of the inquiry here."

"In *Hassall vs. Wilcox*, 130 U. S., 493, 9 Sup. Ct., 590, the judgment in controversy was rendered on a complaint, counting on a note, the consideration of which appeared on its face to be in part for services which were not, and in part for labor claims which were, entitled to preference under the statute of Texas involved in the case; and, this being so, it was held by the Supreme Court that the bondholders had the right to compel the plaintiff to prove affirmatively the amount for which he was entitled to a lien. The case is peculiar and does not rule the point before us." (Page 448.)

In *Central Trust Company vs. Railroad Co.*, 65 Fed., 257, Judge Simonton held that a judgment was valid as against a mortgagee not a party thereto on the ground that the statute authorizing the judgment was in force when the mortgage was made and the rights secured to the judgment creditor entered into and became a part of the contract, and that such

judgment was conclusive as against the mortgagee if the court had jurisdiction, and in the absence of fraud or collusion. In speaking of the case of *Hassall vs. Wilcox*, referring to the record of the mechanic's lien judgment, he said:

> "The judgment was attacked because obtained by fraud and collusion upon a note without consideration, and in a suit brought after the time permitted in the statute. In the case at bar the purchasers, exercising the right of trustees of the mortgage, have come into this court, and have challenged the lien of the judgment, and, in reply to the challenge, have had exhibited to them a judgment against the common debtor for personal injuries, obtained in a suit brought within 12 months after cause of action arose, without shadow of fraud or collusion. The conditions of the South Carolina statute are thus fulfilled."

The same rule prevents a subsequent mortgage lien-holder from attacking a prior judgment lien which is good as against the owner of property.

In *Sioux City Terminal R. & W. Co. vs. Trust Company*, (Cir. Ct. App., 8th Cir.), 82 Fed., 124, it was held that subsequent lienholders stand in the shoes of the mortgagor, where the prior lien has not been obtained and accepted with the intent to defraud them, and that if the owner or mortgagor was precluded from attacking the prior lien, as contrary to the statute, the subsequent lienholders could not.

> "They have no legal lien upon the mortgaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors."
> (Pp. 136-7.)

In *Newark City National Bank vs. Crane* (N. J.), 45 At. Rep., 975, the binding effect of a judgment as against strangers thereto is thus stated:

> "There is a clear distinction between a decree and the law declared by the court which produces the decree, and though a party may not be bound by a decree, as such, he may be bound, so to speak, by the law which produces that decree. This is to say, his rights are affected, as all other citizens' rights are affected, by the declaration of the law made by the courts in the due administration of justice."
> (Page 976.)

But upon whatever grounds a judgment may be collaterally attacked by a stranger thereto, the right to such attack

cannot be greater than that possessed by the judgment debtor. The defendant has the right to raise the question of the want of jurisdiction over him or the subject matter of the suit, has the power to prevent a judgment being rendered against him by fraud or collusion, has the opportunity to set up a want of consideration for the claim sued upon or any other defense tending to show the illegality or invalidity of the claim sought to be enforced, and in case the judgment go against him, has the right by appeal, writ of error or other direct proceeding to reverse or modify the judgment adverely affecting his interest. But a stranger to such suit has not the same right and is not given the same opportunity to defend or appeal. Consequently he is permitted to attack the judgment upon certain grounds when it is sought to be enforced against him. He is, however, in all cases limited to the defenses which might have been interposed and the rights which might have been asserted by the defendant in the suit under whose rights he claims. He cannot assert any different or greater defenses or rights than the judgment debtor could have asserted at the time of the rendition of the judgment. He cannot attack collaterally when the defendant could not have attacked directly in the suit or by appeal. In other words, as applied to the case at bar, the defendant in error cannot attack the mechanic's lien judgment upon any ground which the Oconto Water Company urged as a defense to the suit and urged as a ground of reversal of the judgment in the Appellate Court. The extent, character and validity of the mechanic's lien were disputed by the defendant Oconto Water Company and the defense was interposed that under the statutes of Wisconsin and by the public policy of the state the plaintiff in error had and could have no lien against the water plant. Those questions having been raised by the defendant and determined adversely against it in the mechanic's lien foreclosure suit, the defendant in error, deriving its right and title from the Oconto Water Company, cannot raise again in a collateral proceeding the same question. It, as all other citizens, is bound by "the law declared by the court which produces the decree," not because it is a party or privy therein or thereto, but because the court having jurisdiction of the *res* and of the party from whom all the rights of the contestants are derived, has upon full hearing, without fraud or collusion,

declared the law of the case which is binding upon all parties everywhere and in all other proceedings.

See Swiggert vs. Harber, 4 Scam. (Ill.), 364; 39 Am. Dec., 418.

Voorhees vs. Bank of the United States, 10 Pet., 474.

Crescent City Live Stock Co. vs. Butchers' Union, supra.

V.

Andrews and Whitcomb as stockholders were bound by the decree against the Oconto Water Company to the extent that they could not dispute the validity of it nor say that the Statutes of Wisconsin did not give a lien to the plaintiff in error as therein adjudged.

At the time of the commencement of the mechanic's lien foreclosure suit and at the time of the decree therein, Andrews and Whitcomb each held one share of stock in the Oconto Water Company, which they obtained by assignment from the original subscribers of such stock, and Andrews was the secretary and treasurer of the company. (Record pp. 86, 88, 92.) On the 29th day of September, 1891, and at all times thereafter down to and including the date of the mechanic's lien decree, Andrews and Whitcomb were the absolute owners and holders of the entire capital stock of the Oconto Water Company, and prior thereto had held such stock in their own name, but as collateral security. (Record pp. 97, 125, 126.)

The Court of Appeals decided that their relations to the Oconto Water Company were such that they were *not liable to the creditors* thereof as stockholders, and that they were not such privies to the decree in the mechanic's lien foreclosure as would bind them in their relations as *mortgage creditors* of such company. The question was not decided as to whether they occupied such relation to the Oconto Water Company as stockholders and officers and in control of the affairs of that company as would make them privies to the decree and thereby bound to the same extent as the Oconto Water Company was bound thereby. In other words it was decided that their rights as mortgage creditors would not be cut off or destroyed by such decree, but it was not decided that they, as stockholders, would not be bound to the same extent as the corporation

by the decree rendered establishing the mechanic's lien. This question is therefore open for decision here. If the Oconto Water Company would be estopped to deny that the statutes of Wisconsin did not give to the plaintiff in error a mechanic's lien on the 15th day of September, 1890, on the water plant for the materials furnished for and used in its construction, then they, as stockholders, would likewise be estopped, and cannot be heard in that suit or in this, to question the date, validity or effect of the mechanic's lien statutes by virtue of which the decree was made and the lien enforced.

> "A stockholder is so far an integral part of the corporation that in view of the law, he is privy to the proceedings touching the body of which he is a member."
>
> *Hawkins vs. Glen*, 131 U. S., 319, 329.

> "We do not mean that it is *conclusive* as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged, by payment to some other creditor of the corporation, the full measure of his liability or that he has not *claims against the corporation*, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against the claim or judgment, *but in other respects it is an adjudication binding him.* He is so far a part of the corporation that he is represented by it in the action against it."
>
> *Hancock Nat'l Bank vs. Farnum*, 176 U. S., 640, 643.

The defendant in error, succeeding to the rights of Andrews and Whitcomb, cannot claim, as the court below held, that "under the laws of Wisconsin the plaintiff has no lien. The only claim of lien is under a statute of Wisconsin, which gives no lien," and that "the plaintiff never had any lien. Such is the settled law of this state, and the judgment in the case in the federal court is proof conclusive on the question."

A mechanic's lien decree "when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between

themselves, and may be carried into execution in due course of law to its full extent."

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 141, 157-158.

The doctrine that a stockholder is privy to a decree against a corporation and cannot set up or claim any defense to the action which was available to the corporation, except in case of fraud or collusion, and especially cannot set up collaterally or in another action the same defense that was set up and urged by the corporation in the suit in which the decree was entered, is held and illustrated in the following cases:

Bissit vs. Kentucky Co., 15 Fed. 353 and note.

Chicago Bridge Co. vs. Anglo-American P. Co., 46 Fed. 584.

Hendrickson vs. Bradley, Circuit Court of Appeals, 8th Circuit, 85 Fed. 508.

Wilson vs. Seymour, 76 Fed., 678.

James vs. Central Trust Co., Cir. Ct. of App., 4th Circuit, 98 Fed., 489.

Stutz vs. Handley, 41 Fed., 531.

Singer vs. Hutchinson, 183 Ill., 606.

VI.

The commencement of the action to foreclose the mechanic's lien, being an action in rem, gave the Court exclusive jurisdiction of the subject matter of the suit, and the decree therein was binding, not only on the Oconto Water Company, made defendant therein, but upon all parties, including the defendant in error, and the state Court had no jurisdiction of the same subject matter, and its judgment and the sale under it were void.

The question involved is one of title and right of possession.

No objection was raised to this action brought in equity for possession of the property and to enjoin the defendant from holding or using the same and to grant the title of the plaintiff, on the ground that the plaintiff had an adequate remedy at law. Such objection was waived.

The rule in Wisconsin is that such an objection is waived unless taken specifically by demurrer or answer.

Hoff vs. Olson, 101 Wis., 118.

The state Court recognized the action as a proper one under the laws of Wisconsin for the relief sought.

Scranton vs. Wheeler, 21 Sup. Ct. Rep., 48-52.

The court below therefore had the right to treat the action as involving, among others, the question of title and right of possession, one usually involved in an action of ejectment. In a suit of ejectment or by creditor's bill or in any other suit involving a contest between adverse claims of title the rights of the parties are to be determined as of the date of their respective liens. Th title obtained by the purchaser at the sale in foreclosure proceedings relates back to the date of the commencement of the lien foreclosed and not merely to the date of the judgment rendered or the date of the sale. The priority of the legal title is with the holder of the prior lien.

Whitney vs. Higgins, 10 Cal., 547.

See *Finch vs. Newnham*, 2 Vernon, 216.

Has the plaintiff in error a prior title and entitled to possession as against the claim of title and possession of the defendant in error?

The defendant in error obtained no *title* to the property.

The mechanic's lien foreclosure suit was in equity. Sec. 3323, R. S. Wis., relating to proceedings to foreclose mechanic's liens provides that:

> "Such actions shall be deemed equitable and any issue of fact therein may be referred by the court as in other cases."

The action being one in equity, "the remedies to be applied are not those provided under state statutes, but are such as obtain in this jurisdiction. It is well settled that state statutes cannot add to or take from the jurisdiction of the United States courts."

De La Vergne R. Co. vs. Brewing Co., 46 Fed., 829-30.

> "The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the union."

Payne vs. Hook, 7 Wall., 430.

Although the lien is given by statute, its enforcement may be in the United States court in equity, and such court, having jurisdiction of the subject matter, can give whatever relief it may find just or proper to the complainant, even if it exceed or be much more comprehensive than that specified in the statute, or that which might have been given had the action been commenced in the state court.

In *Sheffield Furnace Co. vs. Witheroe*, 149 U. S., 574, it was held that although the statute limited the mechanic's lien to one acre to be selected by the party entitled to the lien, yet that the court in equity might extend such statutory lien to twenty acres, if the defendant had by stipulation extended the lien over an additional amount of property. The court say:

> "The defendant contends that by the state law the lien was limited to one acre of ground. The plaintiff claims that by virtue of his contract and filing of his statement of lien, he was entitled to a decree subjecting a tract of twenty acres to the satisfaction of his debt. He therefore claims rights of an equitable nature arising from something more than the statute, and based partly upon his contract. Certainly such a claim as that is one of an equitable nature and to be adjudicated only in a court of equity." (Page 580.)

If the court had *power* to grant such extension, it had the *power* to declare a lien where none existed by statute. "The lien judgment is not *void*, because it gave the plaintiff a specific lien on more than one acre of land in an incorporated village." (*McCoy vs. Quick*, 30 Wis., 521-6.) It was valid to the whole extent thereof until duly reversed or modified. *Idem.*

Justice Field in *Davis vs. Alvord*, 94 U. S., 545-6, in speaking of the foreclosure of a mechanic's lien, said:

> "It is essentially a suit in equity, requiring specific directions for the sale of the property such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises."
>
> *See Idaho & O. L. Imp. Co. vs. Bradbury*, 132 U. S., 509.

In such action all persons holding liens on the premises, whether by mortgage, judgment or otherwise, could have been made parties, or might upon application have become parties thereto, and be entitled to payment out of the proceeds of the sale.

Sections 3321, 3324, R. S. Wis., are as follows:

"Section 3321.—Any person having so filed such claim for a lien may foreclose the same by action in the Circuit Court or any County Court having jurisdiction thereof. All persons having filed such claims for liens for work done or materials furnished in the cases mentioned in sections 3314 and 3315, may join as plaintiffs; and if any do not so join or refuse to so join they may be made parties defendant. All persons having liens upon the premises by mortgage, judgment or otherwise, subsequent to the lien sought to be foreclosed, and all purchasers of the premises subsequent to such lien may be joined as parties defendant. In case any person who has filed such claim for lien prior to the commencement of such action, or who has such subsequent lien, or who is such subsequent purchaser, is not made a party to such action he may, upon application at any time before judgment, be made a party defendant thereto, and any person who shall file such claim for lien after the commencement of such action or who shall obtain such subsequent lien by mortgage, judgment or otherwise, or become such subsequent purchaser after the filing of the notice of the pendency of such action, may, at any time before judgment, upon application, be made a party defendant thereto. If such action be brought by a subcontractor the principal contractor may also be made a party defendant thereto. When the place of trial is changed all subsequent proceedings, including the bringing in of new parties, shall be had in the county to which such change is made."

"Section 3324.—The judgment in such action shall adjudge the amount due to the plaintiff, or in case several claims for liens are embraced in the action the amount due to each claimant who is a party to the action. It shall direct that the interest of the owner in the premises at the time of the commencement of the work or furnishing the materials for which liens are given, or which he or any person claiming under him has since acquired, or so much thereof as may be necessary, be sold to satisfy the amount of the lien of the plaintiff or of the several liens embraced in the action, with the costs of such action, including the cost of filing the claims for liens; and that after satisfying the same, together with such costs, the residue of the proceeds be brought into court with the report of sale to abide the order of the court."

The deed given upon the sale under the decree, after confirmation, was effectual to pass to the purchaser all the interest in the premises directed to be sold, and the purchaser after such confirmation of the sale, was entitled to a writ of assistance to obtain possession as against the defendant in the suit, and all persons who may have come into possession of the premises after its commencement.

"Section 3326, Wis.—All sales under such judgments may be made by the sheriff or a referee appointed by the Court for that purpose, who shall give notice thereof in the manner provided by law for the sale of real estate upon execution, unless the Court shall order other or different notice to be given, and shall be absolute and without redemption; and the deed given thereon, in case such sale is confirmed, shall be effectual to pass to the purchaser all the interest in the premises directed to be sold. Such sheriff or referee shall within ten days after making such sale, file with the clerk of the court in which the judgment is rendered a report of the sale for confirmation thereof, and shall, immediately after the sale, pay to the parties entitled thereto the amounts adjudged to them respectively, after deducting the costs thereof, unless otherwise ordered by the court. If any deficiency arise upon such sale in the payment of the sums adjudged to be due to any such claimant of a lien given by this chapter the sheriff or referee shall specify the amount of such deficiency in his report, and if demanded in the complaint or in the answer of any such lien claimant the court, upon confirming such sale, may render judgment therefor against the defendant legally liable to pay the same, which judgment may be docketed and enforced in the same manner that ordinary judgments are. And the purchaser or purchasers at such sale shall be entitled to a writ of assistance to obtain possession of the premises sold in the same manner as is provided in section 3025.

"Section 3025, Wis.—Whenever a title shall have become perfected in any person to any real estate sold by virtue of an execution, or to any part thereof or interest therein, and the person against whom such execution issued or any other person claiming under him by title accruing subsequently to the docketing of the judgment upon which it issued shall be in possession of any such real estate or part thereof or interest therein, and upon demand of the person, his agent or attorney, in whom such title shall have been perfected, shall refuse to surrender the possession thereof to him he may apply to the court from which the execution issued or the presiding judge thereof, by petition, duly verified, setting forth the facts, for a writ of assistance to remove such person from the possession of such real estate and to deliver the possession thereof to him. A copy of such petition, with a notice of the time and place when and where the same will be presented, must be served upon the person against whom the writ is prayed for at least ten days before the same is presented; such petition may be served as a summons in an action in the Circuit Court. The court or such judge may direct such writ to issue, and the same shall be executed and return made in like manner as upon a sale made upon a judgment for foreclosure of a mortgage."

Section 3169, Wis.—Upon any such sale being made the sheriff or referee making the same, on compliance with its terms, shall make, execute and deliver to the purchaser a deed of the premises sold, setting forth each parcel of land sold to him and the sum paid therefor, which deed, upon the confirmation of such sale, shall vest in the purchaser all the right, title and interest of the mortgagor, his heirs, personal representatives and assigns, in and to the premises sold and shall be a bar to all claim, right or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered; and the purchaser, his heirs and assigns, shall be let into the possesion of the premises so sold on production of such deed or a duly certified copy thereof, and the Court may, if necessary, issue a writ of assistance to deliver such possession."

See rules 9 and 10, rules of Practice and Equity, U. S. Court.

Terrell vs. Allison, 21 Wall., 289-91-3.

Root vs. Woolworth, 150 U. S., 401-12-13.

Gelpcke vs. R. R., 11 Wis., 454-8.

F. L. & T. Co. vs. Ry. Co., 44 Fed., 653.

Lewis vs. Hamilton, 58 Pac. (Col.), 140.

The court had jurisdiction to determine the priority and validity of all liens, whether prior or subsequent, and to make all holders thereof parties defendant, and to sell the land free of all encumbrances.

Hefner vs. Ins. Co., 123 U. S., 747-54.

The mechanic's lien decree not only established and enforced the lien as of the 15th day of September, 1890, against the real estate and water plant of the company, but provided that upon a sale of the same by the marshal there should be sold with it "the franchise of maintaining and operating the said plant for the uses to which it is devoted by the law of its incorporation, as an entirety." (Record, p. 19.)

It was contended upon the hearing of that case that the statutes of Wisconsin gave no lien upon the franchises of a corporation, and that therefore a court of equity could not decree one nor could it decree a sale of such franchises, either as a part of or separate from the real estate against which the lien might be enforced. With respect to the contention as

to whether the court could decree a sale of the franchise as well as of the corporeal property, the Court of Appeals adopting the opinion of the court below, said:

> "I think it within the inherent powers of a court of equity to so decree, not that the lien embraces the franchise, but because plant and franchise have by the act of the defendant been rendered inseparable. The plant has been applied to a public use. The public welfare requires that use to be uninterrupted. A court of equity may therefore well require that the right to the use shall follow the tangible property devoted to that use and dependent upon it. * * * The course suggested is conformable to equity. * * * It is demanded by the exigency of the occasion that equity should supplement and effectuate the law."
>
> *Oconto Water Co. vs. National Pipe Works*, 18 U. S. App., 380-403-4.

It has been further held that the transfer of tangible property will in equity carry the franchise of operating it when the separation of the two would injure or destroy them.

Andrews vs. Pipe Co., 46 U. S. App., 619-21-2.

It does not take from the jurisdiction of the federal court exercising its inherent equitable powers, that the state court would not have granted the same or as extensive relief had the action been commenced and determined in that court. Indeed, we know that the state court would not have granted such extensive relief, inasmuch as in *Chapman Valve Mfg. Co. vs. Oconto Water Co.*, 89 Wis., 264, it was said that the mechanic's lien statute "gives no lien upon or right to sell the franchise to operate the works. Whether the statute shall be extended by construction to cases not within its express terms may depend somewhat on its subject matter as related to questions of public policy and convenience. The effects and consequences which may result from an enlarged construction of the statute may be considered in determining its proper construction. * * * Nor has a court of equity power to extend the lien over rights not made subject to it by the statute." (Pp. 273-4.)

Whatever limitations, therefore, may be made in the state Court in a mechanic's lien foreclosure suit do not affect or limit the remedies which a federal Court in equity may prescribe and enforce, and we are here concerned only with the

decree of a federal court sitting in equity, having jurisdiction of the parties and the subject matter of the suit, and the rights and title obtained by the purchaser at a sale under and pursuant to such decree, duly confirmed by the court.

Crescent C. L. S. Co. vs. B. Union Co., supra.

Under a decree in equity for the sale of property, the court virtually has possession of the estate for the purposes of sale, delivery of possession and distribution of the proceeds of sale. The court so in possession of the property becomes its vendor. The marshal or other officer making the sale in equity is but the hand of the court. *The court itself makes the sale and delivers the possession.*

Rorer on Judicial Sales, Sec. 1.
Williams' Case, 3 Bland, 215.
Warfield vs. Dorsey, 39 Md., 299.
Deck vs. Whitman, 96 Fed., 873.

It is on this theory that the rule is established that the title of the purchaser at a sale under a decree in equity does not vest until after confirmation of the sale by the court in which the decree was rendered.

Allen vs. Elderkin, 62 Wis., 627.
Meehan vs. Blodgett, 91 Wis., 63.
Miller vs. Sherry, 2 Wal., 237.

In a suit to foreclose a mechanic's lien, as in a suit to foreclose a mortgage or any similar proceeding affecting the title and possession of real estate, a receiver may be appointed *pendente lite* and the allegations of the bill may, if necessary, at any time be amended to cover such remedy.

Webb vs. Van Zandt, 16 Abb. Pr., 314.
Shields vs. Coleman, 157 U. S., 168-78.
Gaylord vs. R. R. Co., 6 Bis., 286.

It is clear, therefore, that the federal court in the mechanic's lien foreclosure suit, having jurisdiction of the parties and the subject-matter, was authorized not only to try the issues raised by the pleadings, but also to render a decree, to make sale of the premises and to take such proceedings by the appointment of a receiver or by issuing a writ of assistance as might be necessary to deliver the *res* to the purchaser

at the foreclosure sale or to such person as should be entitled thereto. Such jurisdiction having attached on the filing of the bill, the court would retain the same until the judgment was satisfied.

"The *jurisdiction of a court is not exhausted by the* rendition of the judgment, but continues until the judgment shall be satisfied." "Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the constitution." "The two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take within the limits of its jurisdiction for the satisfaction of its judgment and decrees." "To deprive a court of the power to execute its decrees is to essentially impair its jurisdiction."

Central National Bank vs. Stevens, 169 U. S., 432-64-5.
See Terrell vs. Allison, 21 Wall., 289-91.
Root vs. Woolworth, 150 U. S., 401-12-13.

An action to foreclose a mechanic's lien is, as an action to foreclose a real estate or chattel mortgage, substantially an action *in rem,* and although sometimes spoken of as an action *quasi in rem,* its institution, so far as exclusive jurisdiction of the *res* is concerned, is exactly the same as an action strictly *in rem,* binding all parties as to the court in which their remedies must be sought.

Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S., 294.
See Day vs. Micou, 18 Wal., 156-162.

An action to foreclose a mortgage, whether of real estate or of personal property, is "a proceeding *in rem,* as much so as an attachment suit against the property of an absent debtor or a suit instituted to partition real estate. And the property is within the power of the court until the judgment or decree is entered, so that the lien upon it may be enforced as the statute requires."

Broom vs. Armstrong, 137 U. S., 266-278.

"It is true that, in a strict sense, a proceeding *in rem* is only taken directly against property and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties

where the direct object is to reach and dispose of property owned by them or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings *in rem*, in the broader sense which we have mentioned."

Pennoyer vs. Neff, 95 U. S., 714-34.

Jurisdiction of the court has reference to (1) the power of the court over the parties; (2) over the subject-matter; (3) over the *res* or property in contest.

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought."

"Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party."

"Jurisdiction of the *res* is obtained by seizure under process of the court, whereby it is held to abide such order as the Court may take concerning it." (Page 317.)

Cooper vs. Reynolds, 10 Wall., 308-16-17.

See Voorhees vs. Bank, 10 Pet., 449.

The case of *Cooper vs. Reynolds*, supra, is cited in *Roller vs. Holly*, 176 U. S., 398, at page 405, where Justice Brown says:

"In suits for the foreclosure of a mortgage or other lien upon such property (real estate) no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class, *Cooper vs. Reynolds*, 10 Wall., 308, 19 L., ed. 931, is the most prominent example. * * * The object of such attachment is merely to give a lien upon the property which the courts may enforce. And if a lien already exists, whether by mortgage, statute or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution."

A federal court first taking jurisdiction of the subject-matter of a suit and appointing a receiver therein, or in any other matter taking *actual* custody of the property, has exclusive jurisdiction thereof, and a state court cannot thereafter at the suit of another creditor acquire or exercise jurisdiction of the same subject-matter. The court first taking jurisdic-

tion of the *res* withdraws the same from the judicial power of all others, and any proceedings commenced in another court affecting in anywise the same subject-matter are absolutely "nugatory and void" and pass no *title* whatever to the property.

Wiswall vs. Sampson, 14 How., 52.
Railroad Company vs. Railroad Company, 20 Wis., 165.
In re Schloerb, 97 Fed., 326.
White vs. Schloerb, 178 U. S., 542.
Pittsburgh Ry. Co. vs. L. & T. Co., 172 U. S., 493-513.
M. T. Co. vs. Ry. Co., 100 Fed., 897.

The federal courts are independent of the state courts:

"They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judical power of the other, as if it had been actually *carried physically into a different territorial sovereignty.*"

Covell vs. Heyman, 111 U. S., 176.
Heidritter vs. El. Oil Cloth Co., 112 U. S., 294.

So rigidly is this rule enforced that even where the marshal takes property into his possession under color of a writ of attachment, which writ is invalid, the court takes *exclusive* jurisdiction of the subject-matter, and all other creditors having any lien upon or right to the same must go into the federal court for relief, and no other court can acquire any jurisdiction over the property so illegally held under such writ.

Gumbel vs. Pitkin, 124 U. S., 131.

So it has been held that where a marshal, upon a writ of attachment upon mesne process, takes the property of a person not named in the writ, the property is *in custodia legis* and the original owner cannot maintain an action of replevin against the marshal, nor recover the property in any way except *in the court from which the writ issued.*

Lammon vs. Feusier, 111 U. S., 17.
In re Tyler, 149 U. S., 164.

The doctrine in *Wiswall vs. Sampson* applies with like effect whether or not an *actual* seizure of the *res* has been made under judicial process or *actual custody* taken by the

appointment of a receiver. Constructive possession is sufficient, the mere bringing of a suit *in rem* is equivalent to a seizure of the property. An ordinary proceeding upon bill filed to foreclose a mortgage in a case where no receiver is appointed and no service of process has been made and no actual custody of the property has been taken gives exclusive possession of the *res*.

Farmers Loan & Trust Company vs. Lake St. Elev. R. R. Co. et al, 177 U. S., 51.

The doctrine is there stated as follows:

"As then, the bill of foreclosure had been filed in the circuit court of the United States, and the jurisdiction of that court had thus attached before the commencement of the suit in the state court, it follows upon principle and authority that it was not competent for the state court to interfere by injunction *or otherwise* with the proceedings in the federal court.

The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

Nor is this rule restricted in its application to cases were property has been actually seized under judical process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of litigation, the court *may* be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to federal and state courts. *Peck vs. Jenness*, 7 How., 612, 12 L. ed., 841; *Freeman vs. Howe*, 24 How., 450, 16 L. ed., 749; *Moran vs. Sturges*, 154 U. S., 256, 38 L. ed., 981; *Central Nat. Bank vs. Stevens*, 169 U. S., 432, 42 L. ed., 807; 18 Sup. Ct. Rep., 403; *Harkrader vs. Wadley*, 172 U. S., 148, 43 L. ed., 399, 19 Sup. Ct. Rep., 119.

We think that this salutary rule is applicable to the present case. The bill filed in the federal court looked to the enforcement of the trusts declared in the mortgage, the control of the railroad through a receiver, the sale of the railroad, and the final distribution of the assets of the company. Such a proceeding necessarily involves the right of the complainant trustee to act as such, and the determina-

tion of the controversy in respect to the ownership of the bonds and to the power of a majority of the bondholders, by an agreement with the stockholders, to dispense with an enforcement of the provisions of the mortgage by judicial proceedings. These questions are not for our consideration, unless and until they are brought before us on appeal from a final decree of the court whose jurisdiction was first legally invoked to determine them."

That this doctrine applies not only to proceedings in equity to foreclose a mortgage, but to all proceedings to enforce or establish liens or looking towards the control, sale or other disposition and delivery of possession by writ of possession or otherwise of the *res* sought to be affected by the suit, see the following authorities:

Lammon vs. Feusier, 111 U. S., 17.
Heidritter vs. Elizabeth Oilcloth Co., 112 U. S., 294.
Tua vs. Carriere, 117 U. S., 201.
Geilinger vs. Phillipi, 133 U. S., 246.
Rio Grande R. R. Co. vs. Gomila, 132 U. S., 478.
Leadville Coal Co. vs. McCreery, 141 U. S., 475.
Shields vs. Coleman, 157 U. S., 168.
Gaylord vs. Railroad, 6 Biss., 286.
Union Trust Co. vs. Railroad, 6 Biss., 197.
Union Ins. Co. vs. University, 10 Biss., 191.
Riggs vs. Johnson County, 6 Wall., 166.
Cohen vs. Solomon, 66 Fed., 411.
In re Schloerb, 97 Fed., 326.
Appleton W. Co. vs. Trust Co. (Cir. Ct. App., 7th Cir.), 93 Fed., 286.
Adams vs. Mercantile Co. (Cir. Ct. App., 5th Cir.), 66 Fed., 617.
Holland Trust Co. vs. Tramway Co. (Cir. Ct. App., 5th Cir.), 85 Fed., 865.
Leathe vs. Thomas (Cir. Ct. App., 7th Cir.), 97 Fed., 136.
Hubinger vs. Trust Co. (Cir. Ct. App., 8th Cir.), 94 Id., 788-790.
Deck vs. Whitman, 96 Fed., 873.
Iron Mt. R. Co. vs. Memphis (Cir. Ct. App., 6th Cir.), 96 Fed., 113.
Colston vs. S. H. B. & L. Ass., 99 Fed., 305.
M. Trust Co. vs. Ry. Co., 100 Fed., 897.

Riesner vs. Ry. Co. (Texas), 36 S. W. R., 53.
Bragg vs. Gaynor, 85 Wis., 468.
Winner vs. Hoyt, 68 Wis., 278.
N. W. Iron Co. vs. Improvement Co., 92 Wis., 487.
Smith vs. Zimmerman, 85 Wis., 542-5.

It was erroneously assumed in the decision of the case of *Andrews and Whitcomb vs. National Foundry & Pipe Works, Limited*, 46 U. S. App., 294, in the Court of Appeals that the proceedings begun by Andrews and Whitcomb to foreclose their mortgage were *"in the same court"* as the foreclosure proceedings previously begun by the plaintiff in error to foreclose its mechanic's lien. The question was not discussed or decided as to what effect should be given to the mechanic's lien decree or as to what effect the foreclosure proceedings of Andrews and Whitcomb had upon the foreclosure proceedings of the plaintiff in error in the light of the fact that the federal court first took exclusive jurisdiction of the subject-matter of both suits and the later suit was begun in the state court.

It was clearly error, therefore, in the state court to hold that the proceedings in the state court to foreclose the Andrews and Whitcomb mortgages *did not conflict in the slightest degree* with the jurisdiction of the federal court to enforce against the Oconto Water Co. the mechanic's lien.

VII.

The defendant in error acquired only a contract right, if any at all, and not a title to the water plant.

The court below held that the mortgage and sale of the ordinance rights given by the city of Oconto to Andrews and Whitcomb embraced all subsequently acquired real and personal estate and the whole water works plant. (Record p. 31.)

This was doubtless founded upon a dictum in the case of *Chapman Valve Mfg. Co. vs. Oconto Water Co.*, 89 Wis., 264-73, "that the franchise is the principal thing" and the tangible property of the plant follows a sale of the franchise as an incident thereto. But in the final opinion of the federal court of appeals it was held that the transfer of the tangible property would in equity carry the franchise of operating it.

(*Andrews vs. Pipe Co.*, 46 U. S., App., 619-21-2.) If, therefore, the lien of the plaintiff in error was prior to that of the mortgages, the sale under the mechanic's lien decree operated to transfer both the plant and its franchise to the plaintiff in error and the sale of the city ordinance under a subsequent lien could not embrace the water plant itself.

Furthermore, since the decision of the Chapman Valve case the Supreme Court of Wisconsin has held that the ordinance granted to the Oconto Water Company referred to in such case was not a corporate franchise, but was in effect a *mere contract* between the company and the city and that the City of Oconto under its charter had no authority to grant a corporate franchise to this company to erect a water plant.

Oconto City Water Supply Co. vs. City of Oconto, 105 Wis., 76.

See *Linden Land Co. vs. Elec. Ry. Co.* (Wis.), 83 N. W., 851.

State vs. Portage City Water Co. (Wis.), 83 N. W., 697.

VIII.

Andrews and Whitcomb were privies to the mechanic's lien foreclosure suit so far as their rights under their second mortgage was concerned.

The mechanic's lien foreclosure suit having been commenced on the 30th day of January, 1891, Andrews and Whitcomb took their contract or mortgage dated March 13, 1891, subject to that pending litigation and to the rights of the purchaser under the decree therein. The defendant in error can claim no right or title to the property based upon the title acquired by Andrews and Whitcomb at the sale under the judgment foreclosing such contract or mortgage.

"All persons dealing with property are bound to take notice of a suit pending with regard to the title thereto and will on their peril purchase the same from any of the parties to the suit."

Union Trust Co. vs. Southern Nav. Co., 130 U. S., 565-70.

"It is deemed that every person is bound to know the law, and to take notice of what is transpiring in the courts,

from the time when the process is served and the complaint filed until the final judgment is entered. The purchaser *pendente lite* is deemed to be represented in the litigation by his vendor, and the purchaser is just as much bound by the final judgment rendered as is the party whose right he purchases."

Brown vs. Cohen, 95 Wis., 90-3.

"The object of *lis pendens* is not, primarily, notice, but to hold the subject of the suit, the *res,* within the power of the court, so as to enable it to pronounce judgment upon it."

Brown vs. Cohen, supra.

"By the institution of a suit the subject of litigation is placed beyond the power of the parties to it; for whilst the suit continues in court, it holds the property to respond to the final judgment or decree."

Stoddard vs. Myers, 8 Ohio, 203-9.

IX.

The mechanic's lien was given by statute and accrued when the construction of the plant was commenced, and has never been cut off by the mortgagees.

The plaintiff in error having obtained its lien upon the property of the Oconto Water Company by furnishing materials, filing its notice as provided by the statute, and having commenced proceedings to enforce such lien prior to the suit by Andrews and Whitcomb to foreclose their mortgage, they were bound to take notice of such lien and to make it a party to such suit to cut off its lien if claimed by them to be subsequent to their mortgages, or else abide the result of the suit to foreclose the mechanic's lien.

Wiltsie on Mortgage Foreclosure, §62-3.

The plaintiff in error was an encumbrancer and lienholder and therefore a necessary party to the mortgage foreclosure proceedings in order to be affected thereby and to be foreclosed of its lien.

In *Redmon vs. Phoenix Ins. Co.,* 51 Wis., 292, the question arose as to whether a mechanic's lien was an "incumbrance" within the meaning of an answer to a question upon an application for a policy of insurance. It appeared in that

case that certain parties had furnished machinery for a mill erected upon property, and that they had filed a mechanic's lien in the county in which the property was situated. No action had been commenced to foreclose the lien and of course no decree had been entered establishing the lien. The court say:

"We therefore hold that a subsisting mechanic's lien, for which a petition was filed, is an incumbrance within the ordinary meaning of the word."

In *Davis vs. Bilsland*, 18 Wall., 659, it was held under a mechanic's lien statute of Montana similar to the statutes of Wisconsin that "the liens secured to the mechanics and material men have precedence over all other incumbrances put upon the property after the commencement of the building."

In *Brooks vs. Railway Company*, 101 U. S., 443, it is said:

> "Whoever takes a mortgage upon a building in process of erection, should assume that the mechanic's work is to go forward, and he may form some estimate of the amount that will be required." (Page 452.)
>
> "The statute which the courts construed as giving a permanent lien under such circumstances, was in existence when the mortgage of the appellants (defendants) was made. It entered into and became a part of their contract. They knew that the road (plant) was yet to be built, and that while such building would add to the value of their security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage." (P. 451.)

In *Van Stone vs. Mfg. Co.*, 142 U. S., 128-36, it is said:

> "It is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute."

On page 137 the court speaks of the decree rendered in a mechanic's lien foreclosure action as "the action of a court in entering up a *judgment recognizing and enforcing such lien.*"

See Goodman vs. Baerlocher, 88 Wis., 287-292-3.

In re Kirby-Denis Co. (Ct. Ap., 7th Cir.), 95 Fed., 116.

In *Vilas vs. McDonough Mfg. Co.*, 91 Wis., 607, the Court was called upon to determine whether a mechanic's lien prior to the rendition of the decree foreclosing the same was or was not paramount to a mortgage. Under section 3314, R. S.

Wis., which provides that the mechanic's lien "shall be *prior* to any other lien which *originates subsequent* to the *commencement* of the construction * * * or work aforesaid," the court held that the mechanic's lien was paramount in that case, following the decision in *Lampson vs. Bowen,* 41 Wis., 484. Judge Newman said:

> "The condition of the building, its unfinished state, was *notice* to the plaintiff (mortgagee), within the contemplation of the law, that further expenses for the completion of the building for its original purpose as a mill were in contemplation, which in some contingency, not remotely likely to happen, might eventuate in a lien which would be *prior and paramount* to the lien of his mortgage." (Pages 614-15.)

See Fitzgerald vs. Walsh (Wis.), 82 N. W., 717.

In speaking of the character and effect of a mechanic's lien in *Rees vs. Ludington,* 13 Wis., 276-81, it is said:

> "The design was to give to the mechanic a lien from the commencement of the building, equal in power and effect with the lien of another creditor who had obtained and docketed a judgment. The legislature gave him all the advantages of a judgment both as to the legal and equitable estate of the owner."
>
> "The case stands as if the appellants had at the time the building was commenced been judgment creditors of Hull whose judgments were a lien upon his equitable interests in the premises. If having been such judgment creditors their liens would have been prior to that of the respondent's mortgage, then they are now. But if not then, they are subsequent and must be postponed to the lien of the mortgage."

In *McCoy vs. Quick,* 30 Wis., 521-8, in speaking of a mechanic's lien judgment it was held: "That the effect of the lien judgment is the same, as against these defendants, as would have been the effect of a mortgage on the same premises" for the same amount duly executed by the owner and recorded on the day of the commencement of the construction of the building.

In *Whitney vs. Higgins,* 10 Cal., 547, which was an action brought to redeem by the purchasers of premises under a mortgage foreclosure against the purchaser of the same premises under a judgment in a suit brought to enforce a mechanic's lien, Justice Field, delivering the opinion of the court, said:

> "The conveyance to the plaintiff took effect by relation at the date of the mortgage, the 21st of February, 1856. By

it the plaintiff acquired all the estate which the mortgagor possessed in the property on that day. He therefore stands in precisely the same position as though he had purchased the property of the mortgagor at that time."

He further said:

"Though the lien of mechanics is purely the creature of the statute, a decree for the sale of the premises in its enforcement has the same and no greater effect upon the rights of purchasers and encumbrancers, prior to the commencement of suit, than a similar decree would have upon the foreclosure of a mortgage. * * * The plaintiff by his purchase took the title as it existed in the mortgagor at the date of the mortgage. His position in court therefore is that of the owner of the legal title, subject to the mechanic's lien. * * * If an encumbrancer prior to the suit brought, not being made a party, is entitled to redeem, *a fortiori* is a purchaser of the entire estate subsequent to the lien, and before suit, entitled to make a redemption."

It will thus be seen that the title acquired by the plaintiff in error at the sale under the mechanic's lien decree was precisely the same as though it had become the purchaser under a judgment docketed against the Oconto Water Company on the 15th day of September, 1890, or a purchaser at the sale under a decree foreclosing a mortgage executed to it by the Oconto Water Company and recorded on the 15th day of September, 1890; or, *as though it had obtained a valid deed of conveyance from the Oconto Water Company on the 15th day of September,* 1890. If the Oconto Water Company, at any time before the commencement of the proceedings in June, 1891, to foreclose the mortgage given to Andrews and Whitcomb, had the right to convey its property, then the plaintiff in error having obtained a valid lien against the property of the Oconto Water Company prior to that date, which lien has since by valid proceedings ripened into a title good as against the Oconto Water Company, has as valid a title as though the Oconto Water Company had on the 15th day of September, 1890, conveyed to it the interest which it then held in the premises. It has succeeded to the title that the Oconto Water Company possessed, inasmuch as the mortgage foreclosure proceedings, having been taken without making it a party defendant, were as to it inoperative and void.

Hodson vs. Treat, 7 Wis., 263.

Green vs. Dixon, 9 Wis., 532.

Boggs vs. Fowler, 16 Cal., 559.
Title G. & T. Co. vs. Studebaker, 100 Fed. R., 358.

In *Atkins vs. Volmer*, 21 Fed. 697, Judge Nelson held that the foreclosure of a mortgage did not cut off the rights of the holder of a mechanic's lien which, by decree foreclosing the same, rendered after the mortgage was given, was adjudged to commence as of a date prior to the mortgage, altthough the mortgagee had no knowledge of the existence of such lien or of the proceedings to enforce the same before his mortgage was filed of record, such holder of a mechanic's lien not having been made a party to such foreclosure proceedings.

In *Noyes vs. Hall*, 97 U. S., 34, it was held that one in the possession of lands under contract not recorded, must be made party defendant to the mortgage foreclosure suit in order to cut off his right of redemption as against a purchaser at the mortgage foreclosure sale.

> "Parties interested in the premises who were not served with process are not bound by that decree, and it follows that the respondent took his title subject to the rights of the complainant acquired under the deed, just the same as if no such decree had ever been made."

In *Stout vs. Lye*, 103 U. S., 66, it was held that it was not necessary to make a creditor a defendant to a suit foreclosing a mortgage in order to cut off his lien against the equity of redemption of the mortgagor, where such creditor did not obtain his judgment until after the commencement of the foreclosure proceedings, although such judgment when obtained, under the statute of Ohio, bound the land of the defendant from the first day of the term of court at which the judgment was rendered, which antedated the date of the mortgage. The court said that "his encumbrance was actually *created* while the suit was pending," and that when the suit was begun, the creditor was a mere creditor at large, without interest in the property and without any right to defend the action if made a party defendant thereto. It was held that "this encumbrance was *created pendente lite*."

This case does not conflict with the principle for which we are contending, as under the statutes and decisions of Wisconsin a mechanic's lien is created from the date of the commencement of the work of construction, with precisely the same effect as

though it had been a judgment docketed or a mortgage or deed executed and recorded on that day. The encumbrance here was created by the furnishing of the material, had been kept alive by the filing of the claim for a lien in the public records, proceedings in equity to enforce and foreclose the same had been commenced in a court acquiring exclusive jurisdiction of the *res*, the attorney of the mortgagees had appeared for the owner and mortgagor and had filed its answer in the mechanic's lien foreclosure proceedings, contesting the same, the mortgagees had actual notice of all these facts when they commenced the foreclosure proceedings. Certainly it cannot be said that the plaintiff in error was a mere creditor at large, or that its encumbrance was not created until its decree had been entered. Had it not been delayed by the defense so interposed, it would have obtained its decree prior to the commencement of the mortgage foreclosure suit.

X.

The title of the plaintiff in error is based upon the contract which it made with the Oconto Water Company on the 28th day of August, 1890, and upon the mechanic's lien statute of Wisconsin as then construed by the state court, and subsequently construed by the federal court in the mechanic's lien foreclosure suit, and such contract and statutory right could not be taken away or impaired by any change of the statute whether by legislative enactment or judicial construction.

The law in existence when a contract is made enters into and becomes a part of such contract and becomes a rule of property.

Brine vs. Insurance Company, 96 U. S., 627.
2 Jones on Mortgages, §1051.

"The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is therefore void."

Walker vs. Whitehead, 16 Wall., 314-17-18.
See *Barnitz vs. Beverley*, 163 U. S., 118-125, 126.

Green vs. Biddle, 8 Wheat. 1-92.
Peninsular L. & C. W. vs. Paint Company, 100 Wis., 488.
Wright L. Co. vs. Hixon, 105 Wis., 153.

The title of the plaintiff in error is based upon its contract of August 28, 1890, with the Oconto Water Company and its lien under the statutes of Wisconsin dating from the 15th day of September, 1890, which antedate the execution and delivery of the mortgages to Andrew and Whitcomb. (See Record, p. 141.) This contract right and this lien were vasted interests which have never been foreclosed or divested.

The construction given by a court of the state to its statute becomes a part of the statute as though such decision was in terms written therein. The mechanic's lien statute had been construed by the Supreme Court of Wisconsin to give a lien to a party doing work or furnishing material in the construction of a building or other structure for a *quasi* public corporation.

Hill vs. R. R. Co., 11 Wis., 214.
La Crosse & M. R. R. vs. Vanderpool, 11 Wis., 119.
See *Carney vs. R. R. Co.*, 15 Wis., 503.
Vanderpool vs. La Crosse & M. R. R. Co., 44 Wis., 652.
Purtell vs. C. F. & B. Co., 74 Wis., 132.

If it be claimed that the Supreme Court of the state had not given a construction to the mechanic's lien statute at the time of the making of the contract and the commencement of the work of the construction of the plant so as to entitle the plaintiff in error to a vested lien under the statute, yet such construction was given by the Federal Court sitting in the Eastern District of Wisconsin and subsequently affirmed by the Court of Appeals. The rule is established "that the judgments of the United States Courts of the the Wisconsin Districts are to be treated as domestic judgments of the Superior Court of this state." "United States Courts are not foreign within the state where they are held." "In this proceeding the judgment of the plaintiff will have the same effect as if rendered by any Superior Court of this state because it was rendered in a Wisconsin district of a United States Court."

Ballin vs. Loeb, 78 Wis., 404, 413, 414.

To the same effect see

Metcalf vs. Watertown, 153 U. S., 671.

The federal court wrote into the state statute the right to a lien with like effect as though written in by the state Supreme Court.

No question affecting the validity of such lien or the right of the plaintiff in error to proceed to perfect the same by securing whatever title the Oconto Company had on the 15th day of September, 1890, could at any time have been raised down to the time of the decision on February 5, 1895, of the case of *Chapman Valve Mfg. Co. vs. Oconto Water Company*, 89 Wis., 264. The plaintiff in error having secured a valid interest in the property of the Oconto Water Company, no act of the legislature or decision of any court could destroy such right or the title to be secured by the enforcement thereof. If the legislature could not have taken away the right which had become vested in the plaintiff in error to foreclose its valid lien against and acquire the title of the Oconto Water Company by due proceedings to enforce the decree, no like result can be accomplished by the decision of any Court. Contract rights and the remedy to enforce the same can not be divested by any change in the judicial construction of a statute.

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive."

Chief Justice Waite in *Douglas vs. County of Pike*, 101 U. S., 677-87. This doctrine has not been overruled.

See Taylor vs. Ypsilanti, 105 Id., 60-72.
County of Ralls vs. Douglas, 105 Id., 728-32.
Burgess vs. Seligman, 107 U. S., 20-35.
Green vs. Conness, 109 U. S., 104-105.
Anderson vs. Santa Anna, 116 U. S., 356-62.
German Bk. vs. Franklin Co., 128 U. S., 526-38-9.
Knox Co. vs. Bank, 147 Id., 91-99.
Union Bank vs. Board, 90 Fed. R., 7.
Wade vs. Travis Co., 174 U. S., 499-509.

XI.

RES ADJUDICATA.

The sixth finding of fact finds that the decree of the 29th day of July, 1897, was entered in the United States Circuit Court in accordance with the mandate of the Circuit Court of Appeals, which decree has never been modified or altered. (Record pp. 31-32.)

It is not essential, even it be competent, to go back of this final decree of July 29, 1897, to determine what was decided by the Court of Appeals from the opinions filed. Such final decree is unambiguous and as entered is binding on the parties even though it failed to conform to or was contrary to the mandate of the Court of Appeals.

Metcalf vs. Watertown, 34 U. S., App., 107.

It would certainly control as against any *obiter dicta* or inaccuracies or immaterial issues discussed in the opinions filed.

If the Circuit Court misconstrued the mandate or failed to give full and correct force thereto, its action would be binding upon the parties and upon all courts unless corrected by appeal or mandamus.

In re Sandford F. & T. Co., 160 U. S., 247.

What then was the former decision of the federal court?

There must be read into the final decree of July 29, 1897, such portions of the decree of July 17, 1895, as were adjudged to stand as entered after the cause came on to be reheard before the Circuit Court upon the record and mandates of the Court of Appeals. Such final decree so entered and read bound the defendant in error as well as all other parties thereto and adjudged as follows:

1. The property and effects of the Oconto Water Company were sequestered and a distribution of the same or the proceeds thereof was ordered made among its creditors *according to law and in the order of their priority.*

2. The plaintiff in error was adjudged a lien upon all the rights, franchises and property of the Oconto Water Company and the plant constructed by such company in the city of Oconto pursuant to and as provided in its mechanic's lien decree.

3. Said mechanic's lien was adjudged valid and effectual and ordered to be enforced, as a lien *prior* to that of the instrument claimed to be a mortgage bearing date September 13, 1890, under which Andrews and Whitcomb asserted their right to a lien upon the franchises and property of the Oconto Water Company, and as superior and *paramount* to any and all other liens or rights of Andrews and Whitcomb upon or in such franchises and property, including the so-called mortgage of March 13, 1891.

4. The plaintiff in error was thereby *authorized to proceed to the enforcement and satisfaction of its mechanic's lien upon* and *against the franchises and property* of the Oconto Water Company in accordance with and as provided in its decree establishing the same.

5. Defendant in error was required to pay the sum of twenty-five hundred dollars ($2500) adjudged to be paid in the decree of July 17, 1895, to Albert E. Smith, receiver of the Oconto Water Company, balance of compensation due him, and his counsel, as such receiver.

6. The clerk of the court was directed to restore to the defendants Andrews and Whitcomb the possession of the mortgage bonds without adjudging the validity or invalidity of the same or their issue by the Oconto Water Company.

7. The defendant, George W. Sturtevant, Jr., was adjudged to pay any deficiency that should be found due to the plaintiff in error, if any there should be, after applying to the satisfaction of its lien decree theretofore adjudged against the Oconto Water Company the proceeds of the sale made thereunder, the *amount of such deficiency being made to appear to the satisfaction of the court, and an order for such payment entered at the foot of the decree after the amount of such deficiency should be ascertained.*

8. The *legal title* to the land upon which the pumping station and well of the water works plant were located which, by deed dated January 31, 1894, was conveyed by the order of the court by the city of Oconto to the Oconto Water Company, a description of which lands was set forth, was passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, and by the sale in the proceedings to foreclose the same to the defendant in error *as assignee and successor in interest of Andrews and Whitcomb,*

but without prejudice to any rights which the plaintiff in error may have under its mechanic's lien decree or otherwise to redeem from such instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same. (Record pp. 140-146.)

The decree did not purport to pass but plainly excluded from its terms, not only the *equitable* title to the land, but the plant itself and the franchise of operating the same. This equitable title to the land was what the Oconto Water Company had when the mechanic's lien accrued and it was this equitable and substantial title that was held subject to the lien.

A decree in equity in the United States Court does not in itself transfer or convey title to real estate. The legal title remains as before the decree unless the parties make the necessary conveyance in accordance with the terms of the decree.

Gay vs. Parpart, 106 U. S., 679.

Hart vs. Sansom, 110 U. S., 151.

If, however, there be a statute in the state where the land is situated providing that such decree shall have the same operation and effect as if the conveyance ordered thereby had been executed conformably to such decree, the federal court sitting in that state will enforce such provision of the statute.

Langdon vs. Sherwood 124 U. S., 74.

There is no such provision in the statutes of Wisconsin, and there being no evidence that a deed was made by either the Oconto Water Company or its receiver to the defendant in error as directed by the decree on final hearing, the legal title to the premises did not by force of such decree vest in the defendant in error. Such legal title remaining in the Oconto Water Company would pass under the provisions of the decree providing that all property of the Oconto Water Company should be distributed "among its creditors according to law and in the order of their priority," and in accordance with the decree authorizing and directing the plaintiff in error to proceed to sell under its mechanic's lien decree.

Furthermore this part of the decree was unsupported by and beyond any allegations in or issues made by the pleadings and was not authorized by any affirmative relief asked in the pleadings on the part of either Andrews and Whitcomb

or the defendant in error, and so far as it may be claimed as passing any title subject to the right of redemption to the defendant in error it would be without jurisdiction and void.

Reynolds vs. Stockton, 140 U. S., 254, and cases cited.

But as directed by the provisions of this final decree of July 29, 1897, which was binding upon the defendant in error, the marshal proceeded to advertise and sell and to execute his deed upon such sale to the plaintiff in error of the entire water works plant of the Oconto Water Company, and the franchise of maintaining and operating the same.

The sale was confirmed, and the title and right of possession were thereby given to the plaintiff in error.

Dennison vs. U. S., 168 U. S., 241-9.

Was such decree of July 29, 1897, therefore, a bar to this action?

Where as in this case the second action is based upon a different claim or demand, the decree in the prior action operates as an estoppel only as to those *matters in issue* or *point controverted* upon the *determination* of which the finding or judgment was rendered.

The question is "was the right, question or fact distinctly put in issue and directly determined," in the former action.

So. Pac. Co. vs. U. S., 168 U. S., 1.

"Upon a plea of a former decree so much of the former bill and answer must be set forth as is necessary to show that the same point was then in issue."

Story's Eq. Pl., §791.

"As a plea of this kind proceeds upon the ground that the same matter was in issue in the former suit, and as every plea that is set up as a bar must be *ad idem*, the plea should set forth so much of the former bill and answer as will suffice to show that the same point was then in issue and should aver that the allegations as to the title to relief were the same in the second bill as in the first."

1 *Daniels Ch. Pl. & Pr. 5th Ed.*, §661.

Under this rule the answer in this case was not sufficient to support a decree of res adjudicata.

Washington R. R. vs. Bradley, 10 Wal., 299-303.

Furthermore if there be an uncertainty as to what was necessarily involved and decided in a case where several defenses were made and judgment given for defendant or if the complaint contained more than one count and judgment was for plaintiff, the whole subject is open for disposition and no estoppel exists.

Russell vs. Place, 94 U. S., 606.

Bellville Ry. Co. vs. Leathe, 84 Fed., 103 (7 Cir. Ct. App.)

"Every decree in a suit in equity must be considered in connection with the pleadings and if its language is broader than is required it will be limited by construction so that its effect shall be such and such only as is needed for the purposes of the case that has been made and the issues that have been decided." (Citing *Graham vs. R. R. Co.*, 3 Wall., 704.)

Barnes vs. Ry Co., 122 U. S., 1, p. 14.

Reynolds vs. Stockton, 140 U. S., 254-70-1.

The question therefore is whether the issue presented here was raised by the pleadings and determined by the decree of the court in the former action.

It will be admitted that the question of the jurisdiction of the state court to order a sale of the property, confirm the same and transfer the title and possession to the purchaser at the sale was not actually raised, argued, considered or determined in the former action. Was that a question or matter in issue? The former action was originally brought as a creditor's bill after execution returned unsatisfied in which it was alleged that Andrews and Whitcomb had obtained their contracts or mortgages in fraud of the rights of the complainant and therefore such mortgages were void and the prayer of the bill, among other things, was that they be so adjudged. The bill was also framed to recover judgment against Andrews and Whitcomb as stockholders upon the theory that they had failed to pay for the stock which they had received and held. (The bill was not offered in evidence and perhaps can not be considered here.) The answer of Andrews and Whitcomb set forth the execution of the mortgages together with facts tending to show their validity and the amount due thereunder and also facts tend-

ing to show that they held the stock of the company merely as collateral security from the company and not as absolute owners of the same. The answer also set forth the commencement of an action by them to foreclose two of their mortgages, the judgment entered, the sale, the bill of sale given by the referee, and the taking of possession of the water plant as purchasers at the sale. The defendant, Oconto City Water Supply Co., did not appear nor serve any answer. There seemed to be no evidence that it was served with process. The answer of Andrews and Whitcomb denied that the Oconto City Water Supply Company was a corporation. Subsequently the complainant amended its bill by alleging that after the filing of the bill the Oconto City Water Supply Company had been organized under the laws of Wisconsin and *claimed* to own or have some interest in or title to the rights and property of the Oconto Water Company which *claim* was alleged to be *subsequent to the lien* of the complainant. (Rec. p. 129-130.) Subsequently and after the entry of the mechanic's lien decree the bill of complaint was amended so as to allege the date of the contract with the complainant, the furnishing of the material, the filing of the lien, the entry of the decree for enforcement of the lien and that said lien was a first lien upon the property "and entitled to *priority* over all other *liens* asserted by or on behalf of any of said defendants."

Andrews and Whitcomb answered such amendments by alleging that they were not parties to the suit brought to enforce the mechanic's lien; that as to them the action had not been brought by the complainant within the time permitted by the statutes of Wisconsin and that the limitation of the statutes was a bar to the complainant's claim for a lien upon the property as against them and that the mechanic's lien decree was not binding upon them because there was then no law in force in the state of Wisconsin giving the complainant a lien upon the property mentioned in the mechanic's lien decree. (Record pp. 136-7.)

The issues thus raised by the pleadings were:

First. Had the complainant a valid lien as against the Oconto Water Company with the right to proceed to enforce the same by sale of the property.

Second. Was the mechanic's lien decree binding upon the defendants Andrews and Whitcomb as privies to the defendant Oconto Water Company so as to cut off or defeat their rights as mortgage creditors under their mortgage dated September 13, 1890.

Third. Was the complainant entitled to a personal judgment against Andrews and Whitcomb on account of the stock held by them being unpaid.

Fourth. Was the mechanic's lien of the complainant prior in time to that of the first mortgage of Andrews and Whitcomb.

The court determined:

First. That the mechanic's lien decree was valid as rendered against the Oconto Water Company, and the complainant was entitled to proceed to its enforcement.

Second. Andrews and Whitcomb as mortgage creditors were not bound as privies to the mechanic's lien decree so that their rights under their mortgage dated September 13, 1890, were not cut off by the mechanic's lien decree which *as such mortgagees* they could dispute.

Third. Andrews and Whitcomb as stockholders were not liable to the unsecured creditors of the Oconto Water Company inasmuch as they received and held the stock from the Oconto Water Company direct as collateral security for a debt owing by the Oconto Water Company to them.

Fourth. The lien of the complainant was *prior* to that of the lien of the mortgage of Andrews and Whitcomb dated September 13, 1890.

The bill was dismissed only as to the defendant's appealing, and not as to them in all respects.

It will be seen that inasmuch as there was no cross bill filed or affirmative relief asked as to any of these questions none was given. The issue was one relating to *liens* not to *titles*. Such issue was between the complainant and Andrews and Whitcomb. No issue was formed between the complainant and the Oconto City Water Supply Company. The defendant in error asserted no claim of title to the property. It filed no answer but was in default under the allegation of the bill that it claimed to have *some* interest or title to the property of the Oconto Water Company which claim was

subsequent to the lien of the complainant. Andrews and Whitcomb in their answer asserted that they had ceased to be mortgagees and ceased to have any title to or possession of the property sold to them except the stock and bonds of the company, but alleged that the Oconto City Water Supply Company had the title and possession of the plant and property as assignees of the franchise. The only issue therefore raised by their answer related to the validity and priority of their mortgage liens as against the mechanic's lien of the complainant. Under the allegations of the bill and answer putting in issue the question of the validity of their mortgages, it was held that whether or not their mortgages were prior or subsequent to the date of the mechanic's lien of the complainant they had the right to contest the validity and binding effect of such lien as against them, they not having been made parties to the mechanic's lien foreclosure suit so as to be deprived of their rights and claims as mortgage creditors. The court held that as against their first mortgage the mechanic's lien was not binding inasmuch as subsequent to the entry of the complainant's decree the Supreme Court of the State of Wisconsin had decided that the statutes gave no lien and that being the then existing law of the state the federal court would follow such construction of the statute as against their mortgage, they not having been parties to and not bound by the mechanic's lien decree. The only decision made was that the complainant could not enforce its lien against the mortgage lien of Andrews and Whitcomb. The question here is, has the plaintiff in error a title now as against the claim of title of the defendant in error?

XII.

Undue effect and credit were given to the former decree in the Federal Court.

Both the trial court and the Supreme Court held that the decree in the former action decided against the title of the plaintiff and that plaintiff was not entitled to any lien on the property in controversy and that defendant was the owner and holder of the property, free and clear of any claim of the plaintiff. (Record p. 185.)

This decision was put upon the ground that where facts pleaded as a defense, when established, are effectual to defeat the plaintiff's cause of action without any affirmative relief, then a judgment formally adjudicating the existence of such facts, or the effect of them, is always proper. This reasoning however, does not reach the question involved. The defendant in error was in default in the former action where the bill alleged as against it merely that it claimed some right in the property which was *subsequent* to the lien of the complainant. There was no allegation in the bill and no answer of the defendant in error that it claimed a *prior or paramount* right or title to the property upon which the complainant claimed a lien. Whatever rights the defendant in error had were, in fact, derived from Andrews and Whitcomb, and as they obtained no title to or right of possession of the property under their foreclosure decree and sale, the defendant in error succeeded if in any respect by assignment merely to their rights as mortgage creditors. As such mortgage creditors the court held that they had a right to dispute the complainant's lien, and as to them such lien was not enforcible under the statutes of Wisconsin as then construed by the Chapman Valve case. The appeal was not dismissed as to the defendant in error upon the ground that it had a paramount title which it held free and clear of any claim of the plaintiff in error.

"A matter in issue" has been defined in a case of leading authority as "that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading."

Reynolds vs. Stockton, 140 U. S., 254-270.

> "The rule is universal that where he (defendant) appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."
>
> A decree in equity which is entirely aside of the issue raised in the record is invalid and will be treated as a nullity even in a collateral proceeding."
>
> *Idem, supra*, p. 266.

It will thus be seen that there was no issue in the former action upon which the court could base a decree in that case that the defendant in error held and owned the plant and prop-

erty of the Oconto Water Company by claim and title paramount to and free and clear of any claim or lien of the plaintiff in error. The decree in that case did not, in fact, so adjudge, and hence there was no ground upon which the court in this case could so hold and adjudge.

The court could not adjudge to the defendant in error an absolute and paramount title, free and clear of any claim, title or right of redemption on the part of the plaintiff in error unless such matter was in issue, and unless the defendant in error had, by cross bill, sought such affirmative relief.

Mays vs. Pryce, 95 Mo., 603-14.

"A judgment by default is conclusive of all that is properly alleged in the complaint, but nothing more, and as a general rule, only upon the defendant in the character in which he is sued."

Unfried vs. Heberer, 63 Ind., 67-72.

The defendant was sued in the character of a subsequent lienholder.

"It is only when the particular property or right which has been transferred is affirmatively shown to have been the subject-matter of the former litigation and its status settled thereby, that the effect of that litigation is conclusive upon a grantee or transferee of property."

Grunert vs. Spalding, 104 Wis., 193-225.

Hart vs. Moulton, 104 Wis., 349.

Under this doctrine, the defendant in error succeeded only to the right which Andrews and Whitcomb had as mortgagees to contest the lien of the plaintiff in error. That was the only material question raised and determined in the former action under the issue presented by the bill of the complainant, and controverted by the responsive allegations in the answer of Andrews and Whitcomb.

"In order to give a judgment rendered by even a court of general jurisdiction the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be *responsive to the issues tendered by the pleadings.*

Reynolds vs. Stockton; supra, p. 270.

An action brought to set aside proceedings on foreclosure of a mortgage in which the defendant, purchaser at the sale,

did not seek affirmative relief but rested upon pure defense, is not a bar to an action instituted by the defendant in the former action against the plaintiff therein for possession of the premises, in as much as the determination of the issues in one does not determine the issues in the other.

Piper vs. Sawyer, (Minn.), 85 N. W., 206-7.

The final decree in the former action reserved to the plaintiff in error the right to redeem from the mortgage to Andrews & Whitcomb without prejudice on account of the decree undertaking to pass the legal title to the land to the defendant in error. Can it be claimed that the court in this action could cut off this right of redemption by adjudging that the defendant in error owned the water plant "free and clear of any claim or lien of the plaintiff"? If so, the judgment would bar any action which might be brought by the plaintiff in error to redeem from the mortgage, or to be subrogated to the rights thereunder. Certainly if the plaintiff in error can not compel the defendant in error to surrender possession of the property or to pay and redeem its lien, it ought not by the judgment of the state court to lose its right to redeem from the mortgage and be thereby subrogated to the title of the defendant in error.

A judgment of default against a party defendant is an admission of the truth of the allegation in the complaint made against such party.

"The bill when confessed by the default of the defendant is taken to be true in all matters alleged with sufficient certainty."

Thomson vs. Wooster, 114 U. S., 104-111.

Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S., 683.

Hefner vs. N. W. L. Ins. Co., 123 U. S., 747.

Reynolds vs. Stockton, 140 U. S., 254.

"The complaint alleged in effect that the appellants had or claimed to have some interest in or lien upon the premises, but which, if any, was subsequent to the lien of the plaintiff and accrued on or after September 11, 1888; and *hence tendered no issue respecting any prior outstanding paramount title.*"

Cook vs. Goodyear, 79 Wis., 606-11.

Gilchrist vs. Foxen, 95 Wis., 428.

If no such issue was tendered the dismissal of the bill as to the defendant in error would certainly not adjudicate that it held a paramount title to the property.

We submit, therefore, that the court below erred in holding that "respondent is *legally* in possession of the mortgage property," that the plaintiff in error holds a "*junior* lien" instead of a *prior* title, and that the "legal effect" of the alleged former adjudication was that defendant in error "was the *owner* and holder of the property *free and clear of any claim* of the plaintiff."

GEO. H. NOYES,
Counsel for plaintiff in error.

Milwaukee, Wis., March 10, 1901.

No. 216.
Reply Brf. of Noyes for P. E.
Office Supreme Court U.S.
FILED
APR 5 1901
JAMES H. McKENNEY,
Clerk.
Filed April 5, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error.

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

I.

Federal Question.

The rights and title asserted by plaintiff in error were established and accrued under the decree of the federal court of July 27, 1897, reaffirming the decree of that court of July 17, 1895, which readjudged the mechanic's lien and authorized the enforcement and satisfaction of the same by sale of the franchises and property of the Oconto Water Company in accordance with the terms of the decree of October 3, 1892.

These rights and title were denied by defendant in error and by the court below, by refusing to accord to those decrees such effect and such effect only as the same were entitled to. The court below held that the plaintiff in error "never had any lien" and now has no "claim" of any kind against the property, and took no rights or title under the marshal's deed and its con-

firmation by the court. The validity of such lien decrees and the proceedings by the marshal under them "were directly attacked."

Avery vs. Popper, 21 S. Ct. Rep. 94.

Exclusive jurisdiction under such decrees to sell the property, determine all questions of liens and distribution of proceeds of sale, was expressly denied.

Plaintiff in error occupies the same position as Rochereau in *DuPasseur vs. Rochereau*, 21 Wall., 130. Justice Bradley said:

> "Then was Rochereau a subsequent mortgagee to DuPasseur? Was the latter entitled to priority? If so Rochereau would be bound by the judgment though not made a party." (P. 137).

It was held, however, giving the federal proceedings due effect, that Rochereau having the prior title was entitled to the possession of the property unless his debt was paid.

To give due effect to the decrees in question, plaintiff in error is entitled to the rights which accrued to it as a valid prior lienholder, and thus entitled to the possession of the property unless its debt is paid by the defendant in error.

> "Although the claim may not be well founded, the question, nevertheless, was duly raised, and its federal character cannot be disputed. This necessitates the denial of the motion to dismiss."

Blythe vs. Hinckley, 21 Sup. Ct. Rep. 390–392.

II.

Plaintiff in error can recover as it holds title under a prior lien.

Counsel for defendant in error seems to concede that if our lien is senior to the mortgage, the defendant in error must pay our claim on the ground that our lien afforded the "basis for the exercise by the equity court of its jurisdiction to coerce payment." (Brief, p. 13).

This concession is warranted by the case cited, of *Railway Co. vs. Boney*, 117 Ind. 501, on which we relied in the court below as a case in point. Plaintiff in error had a prior, and as valid and binding a lien against the common debtor as Boney had, and is entitled to the relief which the Supreme Court of Indiana gave Boney, in ordering a judgment *in personam* against the reorganized corporation for the amount of the lien and pointing out the course to be pursued in "the exercise by the equity court of its jurisdiction to coerce payment."

In Wisconsin the owner of the legal title to land, though not in possession, may maintain an action in equity against a party claiming under a subsequent lien to set aside a void decree constituting a cloud upon the title and to recover possession of the land.

Kruczinski vs. Neuendorf, 99 Wis., 264.

An action at law in ejectment will not lie to recover an incorporeal hereditament, such as an easement or franchise, by the owner of the legal title thereto, but the action must be in equity.

Racine vs. Cratzenburg, 61 Wis. 481.

Miller vs. State, 77 Wis. 270.

This action being properly brought in equity to acquire possession of the plant and franchise, and to coerce payment of the debt due the plaintiff in error, the priority of its right and title is shown as follows:

Oconto Water Company—common source of title and in possession of property and ordinance from September 15, 1890, to September 29, 1891.

Claim of Title of Plaintiff in Error.	Claim of Title of Defendant in Error.
(1) September 15, 1890. Date of mechanic's lien on equitable title of tangible property of plant. (Record, pp. 19, 37, 47, 49.)	(1) September 18, 1890. First mortgage to Andrews and Whitcomb covering stock, bonds and ordinance rights from city of Oconto. (Record, pp. 16, 23, 44-45, 141.)

(2) January 30, 1891.
Bill in equity filed in federal court to enforce mechanic's lien and for sale of property. (Record, pp. 14, 31.)

(3) October 3, 1892.
Decree recognizing lien on equitable title of tangible property of plant and ordering sale of same, together with the franchise of maintaining and operating plant as an entirety—proceeds of sale to be brought into the registry of the court for distribution among all who should show right thereto, subject to the order of the court. (Record p. 19.)

(4) January 31, 1894.
Legal title to land upon which plant was located, paid for and conveyed to Oconto Water Company. (Record, pp. 22, 31.)

(5) July 29, 1897.
Final decree in United States Court reaffirming decree of July 17, 1895, sequestrating property of Oconto Water Company, ordering proceeds of sale distributed among creditors according to law and in the order of their priority, declaring mechanic's lien prior to first mortgage of Andrews and Whitcomb and paramount to their second mortgage; authorizing enforcement and satisfaction of same by sale of plant and franchise as an entirety, in accordance with the terms of mechanic's lien, decree of October 3, 1892; after applying proceeds of sale in satisfaction of the secured liens, the deficiency, if any, to be ascertained and determined by an order entered at the foot of the decree, and the

(2) March 13, 1891.
Second mortgage to Andrews and Whitcomb covering same property and rights. (Record, pp. 116, 119.)

(3) June 17, 1891.
Suit commenced in state court by Andrews and Whitcomb to enforce lien of the two mortgages, plantiff in error not made a party thereto. (Record, p. 16.)

(4) August 13, 1891.
Judgment by default entered in state court declaring lien on stock, bonds and ordinance rights and ordering sale. (Record, p. 16.)

same to be paid by the defendant Sturdevant; the legal title of the plant then being and to remain in the Oconto Water Company until such company and the receiver thereof should transfer the same by proper instruments of conveyance to the defendant in error, subject, however, to a sale of the franchises and property as an entirety to satisfy the prior mechanic's lien, and without prejudice to any rights of the plaintiff in error to redeem from the mortgage of Andrews and Whitcomb. (Record, 140-6.)

(6) August 28, 1897.
Sale and marshal's deed to plaintiff in error covering (1) legal title, (2) equitable title to property and (3) title to franchise of maintaining and operating plant, confirmed by court. (Record, 18, 20, 31.)

(5) September 29, 1891.
Referee's bill of sale to defendant in error covering stock, bonds and ordinance rights confirmed by state court. (Record, p. 127.)

(6) September 29, 1891.
Possession of entire plant, property and franchises of Oconto Water Company taken by defendant in error.
(Record pp. 97-8.)

III.

Right of Redemption.

Counsel for defendant in error asserts in his brief that "the plaintiff in error had no mechanic's lien in fact" and that therefore "there is no right of redemption." (Page 24).

This question is not involved in the decision of this case unless it be held that the right reserved in the final decree to the plaintiff in error to redeem from the mortgages is cut off by the judgment entered below to the effect that the defendant in error holds the plant "free and clear of any *claim* or lien of the plaintiff." In view of what is said in the opinion of the state supreme court that "respondent is legally in possession of the mortgaged property with at least the rights of mortgagees so circumstanced, it cannot be ousted from

that position without payment of the mortgage indebtedness," thus recognizing the right of the plaintiff in error to redeem, it cannot with consistency be claimed that the court below intended by the terms of the judgment to cut off such right of redemption under the general language that the defendant in error holds the property free and clear of any *claim* of the plaintiff in error. If such, however, would be its effect without discussing the question at length I beg to refer to some authorities bearing upon the question of the right of the plaintiff in error to redeem, should it be held that it is not entitled to the possession of the plant unless it first pays or redeems one or both of the mortgages under which the defendant in error claims title.

The defendant in error presented no such issue by its answer in the court below. Had such a defense been made in the answer it would have been incumbent upon the defendant in error to set forth what it had received in rents and profits while holding and operating the plant, and to offer to surrender possession of the plant upon payment of the amount due on its mortgages, after deducting the net rents and profits derived from the operation of the plant. The plaintiff in error could then have elected to pay the amount so demanded or to have requested an accounting to ascertain the amount, if any remaining to be paid, and upon the payment thereof to become subrogated to the rights of the mortgagees. If Andrews and Whitcomb became the owners of the property by virtue of their purchase at the mortgage foreclosure sale, such ownership was subject to the right of the plaintiff in error to redeem under its mechanic's lien. Except as to this right of redemption there might have been, if the foreclosure judgment and sale had been valid, a complete merger and union of the mortgage interest and the fee. But this merger and union was prevented as to the plaintiff in error so far as it was necessary to preserve its right to redeem and to prevent the extinction of its lien interest as

against such right to redeem. But even as against that right the character of the mortgage interest was changed. The foreclosure and sale, if valid, extinguished the debt so far as it affected the land, and the mortgage interest was no longer a lien held as a mere incident to the debt. Upon redemption the plaintiff in error would be subrogated not to a mere mortgage lien, but to the interest in the land which resulted from the mortgage and its foreclosure if valid. That interest was the entire title subject to the right of subrogation of the plaintiff in error by redemption.

Martin vs. Fridley, 23 Minn., 13.
See Lucking vs. Wesson, 25 Mich., 443.
Renard vs. Brown, 7 Neb., 454-5.
Compton vs. Jesup, (C. C. A. 6th Cir.) 68 Fed. 263-300-332.

Under the terms of the decree of Oct. 3, 1892, of the federal court the defendant in error claiming under the Oconto Water Company by right acquired after September 15, 1890, was in terms barred of its equity of redemption (Record p. 19). Under the judgment of the state court the plaintiff in error was not barred of its right acquired on September 15, 1890, as such judgment purported to vest in the purchaser at the sale only such title as the defendant and any other person claiming under it had obtained "subsequent to the acquirement by the plaintiffs of their rights," to-wit: subsequent to September 18, 1890. (Record p. 123). But defendant in error, or Andrews and Whitcomb its assignors, not having been made parties to the mechanic's lien foreclosure suit would in equity, unless otherwise estopped, be entitled to redeem upon payment of the prior mechanic's lien. Had defendant in error so elected, or the court below so permitted, it could upon amendment by equitable counterclaim set up its right of redemption and upon offering to pay the mechanic's lien be subrogated to the title of the plaintiff in error.

The plaintiff in error with an existing mechanic's lien, valid as against the owner of the property, not having been made a party to the mortgage foreclosure suit in the state court, had and has the right, if necessary to exercise it, although holding a prior lien or title, to pay off and redeem the mortgage in a suit brought for that purpose and asking for an accounting as to the rents and profits received from the mortgagees in possession, with an offer to pay the amount of such mortgage after deducting therefrom when ascertained the amount of the net rents and profits from the operation of the plant.

Farwell vs. Murphy, 9 Wis. 102.
Allen vs. Case, 13 Wis. 621.
See *Clarke vs. Reyburn*, 8 Wall. 318.
C. & V. R. Co. vs. Fosdick, 106 U. S. 47, p. 71.

Such action to redeem will lie in faver of the plaintiff in error, because it was in privity with the Oconto Water Company as mortgagor, that is because it held a valid lien on, or title to the mortgaged premises, or some part of the same as against the mortgagor, although such lien or title be held void or for any reason unenforceable as against the mortgagee or against a purchaser at the mortgage foreclosure sale, having notice of its rights.

See the following authorities:

Rand vs. Cartwright, 1 Ch. Cas. 59.
1 Powell on Mortgages, 261.
1 Robbins' Law of Mortgages, 694.
2 Spence Eq. Juris. 660–669.
Howard vs. Harris, 1 Vern. 190–193.
Tasker vs. Small, 3 My. & Cr. 63.
2 Story Eq. Juris. §1023.
Tiedemann on Real Prop. §334.
1 Herman on Mortgages, §30.
Hodson vs. Treat, 7 Wis. 263.
Green vs. Dixon, 9 Wis. 532.

Bovey Lumber Co. vs. Tucker, 48 Minn. 223.
Turman vs. Bell, 54 Ark. 273.
Beach vs. Cook, 28 N. Y. 508.
Powers vs. Russell, 13 Pick. 69.
Stephenson vs. Edwards, 98 Mo. 623.
Stone vs. Welling, 14 Mich. 514.
Bradley vs. Snyder, 14 Ill. 263.
Compton vs. Jesup, (C. C. A. 6th Cir.) 68 Fed. 263-300.

In *United States vs. Insley*, 150 U. S. 512, reversing the decision of the Circuit Court in 49 Fed. 776, it was held that although a judgment had been entered without any statute authorizing the same, and therefore erroneous, yet the court having jurisdiction of the subject matter and of the parties, its action would be binding and a lien thereby acquired sufficient to support a bill filed by the judgment creditor to redeem from a title obtained by a purchaser under a sale in mortgage foreclosure proceedings, where such judgment creditor was not made a party defendant.

It does not lie in the mouth of the mortgagee, or purchaser with notice, to say, when offered his money on redemption, that as to him the redeeming creditor has no lien or title provided the lien or title is valid as against the common debtor.

See authorities above cited.

IV.

Res adjudicata.

Counsel for defendant in error seems to labor under the impression that the arguments or concessions of counsel and the opinions of the Circuirt Court of Appeals conclusively show what was in issue and what was determined in the creditor's bill suit instead of the final decree which was entered when the cause was reheard

and finally determined in the Circuit Court. The rule is that—

> "In determining what has been adjudged the courts will regard the decree, and in case of ambiguity, but not otherwise, will be governed by an accompanying opinion; where it is free from ambiguity it speaks for itself and cannot be qualified by an opinion by which it may have been preceded."
>
> *1 Herman on Estoppel and Res Adjudicata, p. 471.*
>
> *New Orleans N. Co. vs. New Orleans, 14 Fed., 373.*

Anything in a decision or a decree outside of the issues properly raised in the record is invalid and is treated as a nullity. *Reynolds vs. Stockton*, 140 U. S. p. 266. Any attempt to adjudge a paramount title, free and clear of any adverse claim, either in Andrews and Whitcomb, or in defendant in error would have been beyond the issues made by the pleadings, no such affirmative relief having been sought by cross bill or otherwise as a foundation for such adjudication.

Chapin vs. Walker, 6 Fed. 794.
Brande vs. Gilchrist, 18 Fed. 465.
Armstrong vs. Bank, 37 Fed. 466.
White vs. Bowen, 48 Fed. 186.
Wood vs. Collins, 60 Fed. 139.
Jackson vs. Simmons, (C. C. A. 7th Cir.) 98 Fed. 768.
Washington R. R. Co. vs. Bradley, 10 Wall. 299.
Armstrong vs. Pierson, 5 Iowa, 317.
M'Connell vs. Smith, 23 Ill. 611.

The mandate of the Court of Appeals dated October 5, 1896, ordering that the decree of the Circuit Court be reversed and the cause remanded with instructions to dismiss the appeal for want of equity, was on motion on behalf of defendant in error modified as follows on the 18th day of May, 1897, to-wit: The motion

> "that mandate should direct that provision be made in the decree for the conveyance to appellant

> Oconto Water Supply Company of the legal title to the land holding the pumping station and wells of the water works plant be and the same is hereby overruled, with leave to the court below to make necessary and proper orders for transmission of the legal title to property."

Thereupon the court below was "commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said decree notwithstanding." (Record p. 143).

The mandate so modified therefore gave the requisite authority to the court below to proceed with the cause to a final decree and to dispose of each of the issues under the pleadings in such way as should be according to right and justice and in accordance with its interpretation of such mandate so modified.

Concurrence of four conditions is necessary to *res adjudicata*.

1. Indentity of thing sued for.
2. Identity of cause of action.
3. Identity of persons and parties to the action.
4. Identity of the quality in the person for or against whom the claim is made.

Lyon vs. Mfg. Co., 125 U. S., 698, 700.

The first two conditions are lacking in the case at bar, viz: identity in the thing sued for and identity of cause of action. Whatever questions of fact and of law were determined or remained undetermined by the final decree of July 29, 1897, one thing is certain, that neither the plaintiff in error nor the defendant in error was cut off from the right to redeem the property from the lien of the other. Nor was the question as to which was entitled to possession of the plant determined. Certain it is that the question whether "the mechanic's lien decree took *precedence* of subsequent mortgages was not disposed of by the Court of Appeals," but was left

as the court below determined it to be in the decree of July 17, 1895. There is therefore no basis for the contention of defendant in error that it was adjudged a *paramount* lien upon the property. This will plainly appear from the opinion of Judge Jenkins filed upon the rehearing in the Circuit Court determining what the final decree should be under the mandate of the Circuit Court of Appeals. As suggested upon the oral argument, the opinion is here printed in full as follows:

"MEMORANDA FOR COUNSEL.

Jenkins, J. Upon the motions presented to the court upon the filing of the mandates of the Court of Appeals, this court has reached a conclusion with respect to the proper decree to be entered.

"*First.* That the decree of this court, of July 17th, 1895, do stand as entered, except that said decree be set aside, pursuant to the mandate of the Court of Appeals, as to the defendants S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company and the City of Oconto, and that as to such defendants the bill be dismissed for want of equity, with costs in favor of the said defendants.

"*Second.* That as to all the other defendants, except the Oconto Water Company and George W. Sturtevant, Jr., the said bill be dismissed for want of service of process, but without costs.

"*Third.* That the decree to be entered should provide for the conveyance by the Oconto Water Company to the Oconto City Water Supply Company of the legal title to the land upon which the pumping station and wells of the water works plant are located.

"*Fourth.* That such decree should also provide for the restoration and surrender by the clerk of the court of the bonds taken from Andrews and Whitcomb by the court and deposited by them with the clerk, under the order of the court; but this without adjudging the

validity of the bonds and being merely a provision for the restoration to Andrews and Whitcomb, of that which by the determination of the Court of Appeals had been erroneously taken from them.

"*Fifth.* That the complainants are entitled to a decree against George W. Sturtevant, Jr., for the full amount of the stock transferred to him by Garland, there having been no payment upon the subscription to such stock.

"*Sixth.* The order of March 5, 1894, restraining the marshal from proceeding to sell under the mechanic's lien decree, was superseded by the fifth clause of the decree of July 17th, 1895. There would seem to be no necessity for further order in respect thereto. If the contention of the complainant that the mechanic's lien decree took precedence of subsequent mortgages was not disposed of by the Court of Appeals, it should be placed in a position to be able to redeem from the sale under the mortgages to Andrews and Whitcomb. If that contention was disposed of by the Court of Appeals, a sale under the mechanic's lien decree can do no harm to Andrews and Whitcomb or their successor in interest, beyond possibly creating a cloud upon their title. The court would not, however, permit this to be done if it was clear from the several opinions of the Court of Appeals that the contention in that respect had been determined.

"I cannot spell out from the opinions of that court that the precise contention had been considered and determined, unless it must be held to have been so determined by the fact of the reversal of the decree of this court and the dismissal of the bill for want of equity as against Andrews and Whitcomb and their successor in interest.

"A decree may be prepared in accordance with these suggestions."

If defendant in error had been aggrieved by the final decree as entered and had thought that the Circuit

Court had misconstrued the mandate of the Court of Appeals or had failed to give full and correct force thereto or had not granted to it affirmative relief or all the relief possible under the issues made by the pleadings, or had failed to adjudge all that had been considered in the opinions filed by Judge Woods, its remedy was by mandamus or appeal. It is too late now to complain of, or ask unwarranted rights under such final decree.

In re Sandford F. & T. Co., 160 U. S., 247.

V.

The decision by the Supreme Court of Wisconsin of the case submitted of *Pittsburgh Testing Laboratory vs. Milwaukee Electric Railway & Light Company*, while it may not affect the question of *res adjudicata* will doubtless throw some light upon the principal contention of counsel for defendant in error that "the plaintiff *never* had any lien. Such is the settled law of this State and the judgment in the case in the federal court is proof conclusive on the question."

Counsel seems to contend that the doctrine of *Hill vs. Railroad Company*, 11 Wis., 223, was not overruled by *Chapman Valve Co. vs. Oconto Water Co.*, 89 Wis., 264, but that the latter case was decided upon some question not already decided in the *Hill* and *Purtell* cases. Although the opionion in the *Chapman Valve* case did not in express terms state that the *Hill* case was overruled, yet such was the effect of the decision and this was formally announced in the later case of *C. & N. W. Ry. Co. vs. Forest Co.*, 95 Wis., 80–90. Upon this question Judge Jenkins said in speaking of the *Chapman Valve* case:

> "This decision reverses the former holdings of that court referred to in the opinion of this court reported in 52 Fed. 43, and in conformity to which holdings that decision was made." (68 Fed. 1008).

The opinion, therefore, in the *Pittsburgh Testing Laboratory* case when filed may be of some value in determining whether the mechanic's lien statute of Wisconsin did give a lien to the plaintiff in error under its contract to furnish material for the construction of the plant of the *Oconto Water Company*.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

Milwaukee, Wis., March 29, 1901.

No. 33.

Sup. Ct. Bff. of Noyes for Pl.

FILED
JUL 16 1901
JAMES H. McKENNEY,

Filed July 16, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. ~~316~~ 33

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

Supplemental Brief containing Opinion Supreme Court of Wisconsin in Pittsburg Testing Laboratory v. Railway & Light Co.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

EVE. WIS. CO., MIL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 216.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

As suggested upon the argument of this cause, the opinion of the Supreme Court of Wisconsin in the case of *Pittsburg Testing Laboratory vs. Milwaukee Electric Railway & Light Company*, filed June 27, 1901, is here printed. The action was begun March 13, 1900. The following are the substantial allegations of the complaint which the Court holds entitles the plaintiff to a mechanic's lien:

"The said defendant The Milwaukee Electric Railway and Light Company is and was at all the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, located at the City of Milwaukee, in said state, authorized to engage and engaged in the business of operating in said city a system of street railways and an electric light and power plant; that the said defendant sells electric light and power produced at such plant and has a contract with the City of Milwaukee for lighting certain streets in said city, which said contract was entered into on the 15th day of December, 1895, and by the terms thereof, expires upon the 15th day of December, 1900, and that the said defendant is now engaged in carrying out and completing said contract by means of its plant and appliances, other than the new power house hereinafter mentioned.

Plaintiff further shows that the said defendant company has long prior to entering upon the construction of such new power house constructed power houses in various parts of said city and placed therein proper engines, boilers and machinery and has ever since operated and used and is now operating and using the same for the purpose of producing electricity; that the said last named power houses and appliances therein contained are amply sufficient for the purpose of supplying with electricity and operating the system of street railways and electric light and power plants of the defendant corporation as they have been heretofore and now are constructed and carried on and sufficient to enable it to carry out and fulfill its said contract with said City of Milwaukee until the expiration thereof.

That the said defendant corporation is contemplating extensions and additions to its said system of street railways and to its lighting and power plants; that to operate such systems and plants when so increased and extended as contemplated, a new power house is necessary; that for the purpose of constructing such new power house the said defendant corporation in the year 1898 caused plans and specifications to be prepared and made therefor by one H. J. Esser, an architect of the City of Milwaukee.

That prior to the 6th day of February, 1899, the defendant co-partners were employed by and entered into a contract with the said defendant corporation to perform work and labor and to furnish materials according to said plans and specifications in and about the erection and construction of a brick building to be used as such new power house, owned by the said defendant corporation, and situated on the land hereinafter specifically described. * * *

That such new power house stands and is situated upon the following described land, to-wit: Lots numbered eight (8) and nine (9) in block number forty-seven (47), in the Seventh Ward in the City and County of Milwaukee, Wisconsin; that said defendant company at the time of making said contract with said defendant co-partners was and ever since has been and now is the owner of said land and of the said new power house building situated thereon; that the above described land does not exceed one acre in extent and is within the limits of an incorporated city; * * *

Wherefore, the plaintiff demands judgment that the amount of its said lien be ascertained and adjudged; that the interest of the defendant corporation in the said lands hereinbefore described at the time of the commencement by the plaintiff of work under its said contract with the said defendant co-partners, to-wit., February 6th, 1899, or the interest therein which the said defendant corporation or any person claiming under it has since acquired, be sold to satisfy the amount of the plaintiff's lien so ascertained and adjudged and that the plaintiff have the costs of this action and such other and further relief as may be equitable."

OPINION.

"CASSODAY, C. J.: This is an appeal from an order sustaining a demurrer to the complaint to enforce a sub-contractor's lien upon the premises described. The complaint, after alleging that during the times therein mentioned the plaintiff was a corporation located at Pittsburg, Pa., and that the defendant, The Milwaukee Electric Railway and Light Company, was a corporation located at Milwaukee, and organized to engage and engaged in the business of operating in the City of Milwaukee a system of street railways and an electric light and power plant, and that the defendants Warren and John Roberts were co-partners engaged in the business of civil engineers and contractors, alleges, in effect, that the electric company sells electric light and power produced at such plant, and has a contract with the City of Milwaukee for lighting certain streets therein, which contract was entered into December 15, 1895, and by its terms expires December 15, 1900; that the electric company is now engaged in carrying out and completing such contract by means of its plant and appliances *'other than the new power house hereinafter mentioned'*; that the electric company had long prior to entering upon the construction of such new power house, constructed power houses in various parts of the city and placed therein proper engines, boilers and machinery, and has ever since operated and used and is now operating and using the same for the purpose of producing electricity; that the last named power houses and appliances therein contained are amply sufficient for the purpose of supplying with electricity and operating the system of street railways and electric

light and power plants of the electric company as they have been heretofore and now are constructed and carried on and sufficient to enable it to carry out and fulfill its contract with the city until the expiration thereof; that the electric company is contemplating extensions and additions to its system of street railways and to its lighting and power plants; that to operate such systems and plants when so increased and extended as contemplated, a new power house is necessary; that for the purpose of constructing such new power house the electric company in 1898 caused plans and specifications to be prepared and made therefor by an architect of the city; that prior to February 6, 1899, Warren Roberts & Co. were employed by and entered into a contarct with the electric company to perform work and labor and to furnish materials according to plans and specifications in and about the erection and construction of a brick building to be used as such new power house, owned by the electric company and situated on the land hereinafter specifically described; that in and by such contract it was provided that all the structural material used and employed in the construction of such building should be tested and inspected by this plaintiff at the expense of Warren Roberts & Co.; that prior to February 6, 1899, the plaintiff was employed as sub-contractor by Warren Roberts & Co., under their contract with the electric company, to test and inspect such structural material; that as such sub-contractor, under such employment, the plaintiff performed work and labor for Warren Roberts & Co., between February 6, 1899, and August 19, 1899, that is to say, inspected and tested the structural material used and employed by Warren Roberts & Co. in the construction of such building under and pursuant to the provisions of the plans and specifications aforesaid; that the exhibits attached, contain a true and correct statement of the work, tests and inspections thus performed by the plaintiff, showing the amount of work done and the prices therefor; that such prices were the prices agreed upon between the plaintiff and Warren Roberts & Co., for the doing of such work; that all of such work and labor was done and performed upon structural material which was sold and furnished to be used and which was actually used by Warren Roberts & Co., in the construction and erection of such new power house; that such new power house stands and is situated upon two lots therein described; that the

electric company at the time of making such contract with Warren Roberts & Co., was and ever since has been and now is the owner of the land and of the new power house building situated thereon; that the same does not exceed one acre in extent and is within the limits of the city; that the last date of the performance of such labor of this plaintiff was August 19, 1899; that September 20, 1899, this plaintiff gave to the electric company the notice of its claim for a lien and statement thereof, of which true copies are hereto attached; that October 13, 1899, this plaintiff gave to the electric company the notice and statement of the work, tests and inspections, of which true copies are hereto attached; that November 29, 1899, this plaintiff duly filed, as required by law, its claim for lien for the amount due and owing to it from Warren Roberts & Co., in the office of the clerk of the Circuit Court of Milwaukee County, a copy of which claim for lien is hereto attached; that such claims and all the allegations thereof are true and are hereby made a part of this complaint; that one year has not elapsed between the doing of such work and labor and the commencement of this action; that there is now due and owing to the plaintiff from Warren Roberts & Co., by reason of such claim, $777.29, and interest thereon from August 19, 1899. Wherefore, the plaintiff demands judgment that the amount of its lien be ascertained and adjudged and enforced against such premises, with costs.

The question presented is whether the facts stated are sufficient to entitle the plaintiff to a sub-contractor's lien upon the premises described under the statutes of this state for the work and labor performed. (Secs. 1775, 1775a, 3314, 3315, R. S.) The statutes declare, in general terms, in effect, that the party performing such work and labor shall have a lien upon such building and the interest of the owner thereof, therein, upon complying with the provisions of such statutes. (Id.) It is virtually conceded that the facts alleged would entitle the plaintiff to such lien, if the premises were owned by a private party and used for private purposes. But it is claimed, and the trial court manifestly held, that such statutes are not applicable to property of a *quasi* public corporation engaged in operating a system of street railways and an electric light and power plant in the City of Milwaukee. In support of such claim counsel rely upon certain decisions of this Court; and

counsel for the plaintiff rely upon certain other decisions of this Court in support of its claim for a lien herein. We shall not here undertake to harmonize or reconcile all of such decisions—much less all that has been said in the different opinions in support of such decisions; but we will attempt to decide this case in accordance with the principles of law applicable to the facts stated. The early case of *Hill vs. The La Crosse and Milwaukee R. R. Co.*, 11 Wis., 214, 221, was an action to enforce a mechanic's lien for building a part of a brick block which, had it been completed according to the contract, would have extended 'along the whole front of the block, upon the street—being 420 feet and to the depth of 55 feet—and constituted the defendant's depot in Milwaukee.' The 'judgment was recovered by default, and was entered for a lien upon the interest of the company in the whole block 41.' On the application of the company for a modification of the judgment it was made to appear, 'that the railroad track was laid across the east part of the block between the buildings and the river—that the whole block was not necessary or convenient for the use of the buildings erected which were designed for stores and offices'; and thereupon the Court modified the judgment 'so as to confine the lien to the west 60 feet of the particular lots on which the building as far as erected actually stood.' On the appeal by the plaintiff from such modified judgment, the same was reversed by this Court, which held that the plaintiff was entitled to a lien upon one acre in the block; and that as the block exceeded an acre it was necessary for the Court to determine to what portion of the block the lien extended; and so this Court came to the conclusion, 'that the lien of the appellants was equivalent to a mortgage by the company of an acre in the block, and that it should be adjudged to cover the south one acre of the block, extending from the river to the street, and that it should be so sold as to leave what remained to the company in a compact form, extending also from the river to the street.' The Court reached that conclusion expressly because the premises were 'at the very end of the road, and where, from the very nature of the premises, it would be more convenient to both parties,' that they should be so divided, in order that each party should 'have access both to the river and the street.' As the land was situated at the very end of the railway tracks, the lien could be thus enforced without de-

stroying any of the corporate franchises of the company. The enforcement of the lien could at most only result in acquiring some of the property of the corporation not essential to the enjoyment of such corporate franchises. Upon that ground the decision may be sustained, although the reasoning of the opinion may not in all respects be approved. The learned justice who wrote the opinion, in a note to the case, states that some of such reasoning was inapplicable. The decision seems to have gone largely upon the ground of the superior equity. Two years after that decision a mechanic's lien, in favor of a sub-contractor, was enforced by this Court against the depot of a railroad company and a certain amount of land upon which it was situated, seemingly without reference to or consideration of, the question whether the corporate franchises of the company were thereby destroyed or impaired. *Carney vs. The La Crosse and Milwaukee R. R. Co.*, 15 Wis., 503, 509. At the same term of the court it was held that a municipal corporation was not liable to garnishment in an attachment suit. *Burnham vs. the City of Fond du Lac*, 15 Wis., 193. That case was followed in *Buffham vs. the City of Racine*, 26 Wis., 449; and *Merrill vs. Campbell*, 49 Wis., 535. Upon the principle involved in those cases, it was subsequently held by this Court that the lien of a sub-contractor, under the statute, did not extend to machinery furnished by him and placed in a building constituting a part of the water works of a city. *Wilkinson vs. Hoffman*, 61 Wis., 637. This was not put upon the ground that the general language of the statute (Sec. 3314) was not broad enough to authorize such lien, but on the grounds of public policy and because the objects of municipal government forbid that the clause of the statute referred to should be held applicable to machinery placed in a building constituting a part of the city water works; that it stood upon the same ground as where material is furnished for a county court house, jail, public school building or other public building which are held to be exempt from the operation of mechanic's lien laws; and that upon the grounds of public necessity and convenience it was held that the lien did not attach. That case has been repeatedly approved by this Court. The *City of Platteville vs. Bell*, 66 Wis., 326, 334; *Chapman Valve Manufacturing Co. vs. Oconto Water Co.*, 89 Wis., 264-271; *Strike vs. Wisconsin O. F. M. L. Ins. Co.*, 95 Wis., 586. A promi-

nent author states that: 'On the grounds of public policy the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties and towns, for public use.' 1 *Jones on Liens*, 2d Ed., Sec. 1375, citing many adjudications from numerous states. In support of the proposition see *Leonard vs. City of Brooklyn*, 71 N. Y., 498; *Board of Commissioners vs. O'Connor*, 86 Ind., 531. The same rule is there stated as applying to school houses and water works so erected for public use. The 'public policy' mentioned, seems to be nothing more than an enforcement of the old common law rule, as stated by Savage, C. J., that: 'When a statute is general, and any prerogative, right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him.' *The People vs. Herkimer*, 4 Cowen, 348. In an earlier case in the same state it was said, that: 'In a representative government where the people do not and cannot legally act in a body where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent. * * * On the ground of expediency and public convenience, this was necessary; as an attribute of sovereignty it was equally important to be preserved.' *The People vs. Gilbert*, 18 Johnson, 229. The rule thus stated by Chief Justice Savage was, at an early day, expressly sanctioned by the Supreme Court of the United States, and then added that: 'The doctrine that the government should not, unless named, be bound by an act of limitations, is in accordance with that just cited from Bacon, because if bound, it would be barred of a right; and, in all such cases, is not to be construed to be embraced unless named, or what would be equivalent unless the language is such as to show clearly that such was the intent of the act. * * * The real ground is a great principle of public policy which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided.' *U. S. vs. Knight*, 14 Peters, 315. See also *Savings Bank vs. U. S.*, 19 Wall., 239; *U .S. vs. Herron*, 20 Wall., 263. As stated in one of these cases, the same principle has been decided in several of the states; and all upon the same ground. In some of the cases it is held, that the statutes of limitation do not run against

the state unless expressly declared. *The People vs. Gilbert, supra; Commonwealth vs. Hutchinson,* 10 Pa. St., 466. In other cases the rule has been applied to the discharge of bankrupts or insolvents. In the administration of government the municipality is the agency of the state. The question recurs whether the rule applicable to municipalities applies also to *quasi* public corporations. Upon that question there seems to be a diversity of opinion. 1 *Jones on Liens,* Secs. 1378, 1618 et seq. There can be no question in this state but what electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. They both have the right of eminent domain. Sec. 13, Art. I., Con.; Secs. 1845-1863a, Stat., 1898. Such being the relationship between the corporation and the public, the Supreme Court of the United States has held, that: 'Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges or other property of a railroad company that *may be essential in the operation and maintenance of its road for the public purposes* for which it was established.' *Buncombe County Commissioners vs. Tommey,* 115 U. S., 122. In that case Mr. Justice Harlan, speaking for the whole court, said, in effect, that 'a different construction of the statute would enable parties having liens' for small amounts, 'to destroy a public highway, and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature, unless the words of the statute clearly require it to be done.' Id., page 129. Thus it has been held in Pennsylvania that 'the results to be produced to the public by public corporations' for building bridges, turnpikes, railroads and the like, 'cannot be disturbed by the seizure by creditors of any part of the property *essential to their active operations.*' *Foster vs. Fowler,* 60 Pa. St., 27. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking and accommo-

date the public. (Id.) Such rules were applied in that case to a corporation for introducing water into a town for the accommodation of its inhabitants. (Id.) The principle involved in that case was approved in a later case, in the same court, 'where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation.' *Girard Storage Co. vs. Southwork Co.*, 105 Pa. St., 248; and also see *Guest vs. Water Co.*, 142 Pa. St., 610, 615; *Reynolds vs. Reynolds Lumber Co.*, 169 Pa. St., 626. On the other hand it has been held in the same state that: 'Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation.' *Plymouth R. R. Co. vs. Calwell*, 39 Pa. St., 337. And yet in the same case, Woodward, J., speaking for the court, said: 'Though the corporation in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be *balked*, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation.' (Page 339.) See also *Oakland Railway Co. vs. Kernan*, 56 Pa. St., 203. The rule of construction, mentioned, and some of the adjudications cited in support of it, have repeatedly been sanctioned or recognized by this court. *The Yellow River Improvement Co. vs. Wood County*, 81 Wis., 560-2; S. C., 17 L. R. A., 92, and note; *The Fond du Lac Water Co. vs. the City of Fond du Lac*, 82 Wis., 322, 329; *Chapman Valve Manufacturing Co. vs. Oconto Water Co.*, 89 Wis., 264; *C., M. & St. P. R. Co. vs. City of Milwaukee*, 89 Wis., 506; the *State ex rel. Milwaukee Street R. Co. vs. Anderson*, 90 Wis., 550; *Wright vs. The Milwaukee Electric Ry. and Light Co.*, 95 Wis., 29; *C. & N. W. Ry. Co. vs. Forest Co.*, 95 Wis., 80, 89; the *State ex rel. Badger Ill. Co. vs. Anderson*, 97 Wis., 114. In a recent case Mr. Justice Marshall said: 'Much confusion often happens from a failure to distinguish

between those franchises that are corporate in a strict legal sense, and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation.' The *State ex rel. Atty. Gen. vs. Portage City Water Co.*, 107 Wis., 446; S. C., 83 N. W., 699. The rule to be deduced from the best considered cases, seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes. But that under the general language of such statutes a lien may be enforced against such structures and property of the corporation as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In addition to the authorities cited, see *National Foundry and Pipe Works vs. Oconto Water Co.*, 52 Fed., 43; S. C., 68 Fed., 1006; 2 *Jones on Liens*, 2d Ed., Secs. 1618, 1619; 3 *Elliott on R. R.*, Secs., 1066-1075. In one of these sections Mr. Elliott says: 'The courts will not presume that the legislature intended to subject the public to the annoyance and inconveniences which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required.' Id., Sec. 1066. The distinction between the cases where liens cannot be enforced against a particular structure or section of a railway, essential in its operation and maintenance for the public purposes for which it was established, and the cases where the lien may be enforced against a particular structure belonging to such corporation, but not so essential to its operation and maintenance, and hence which may be taken from the corporation without destroying or impairing its corporate franchises, have not always been observed in this court. The question is not whether the legislature may, in its wisdom, authorize the enforcement of such lien in any case, but whether the general language of our statute shall be so construed as to authorize a *pro tanto* destruction of the corporate functions, created as an entirety and primarily for the benefit of the public. In other words, courts are not authorized, in the construction of such general language, to repeal *pro tanto*

the charter of a corporation so created primarily for the public benefit, especially in violation of a well-established rule of construction of such general statutes so far as public rights are concerned. Such rule was not observed in *Carney vs. The La Crosse and Milwaukee R. R. Co.*, 15 Wis., 503, and the more recent case of *Purtell vs. Chicago Forge and Bolt Co.*, 74 Wis., 132. In the case at bar it is admitted that the defendant was engaged in carrying out and completing its contract with the city by means of its plant and appliances, *'other than the new power house'* in question. In other words, it is admitted that the new power house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric light and power plant for the public purposes for which the defendant corporation was established. It follows from what has been said, that the plaintiff is entitled to such lien.

By the Court: The order of the Circuit Court is reversed and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law."

It is respectfully submitted that this opinion in effect overrules *Chapman Valve Mfg. Co. vs. Oconto Water Company*, 89 Wis., 264, and reasserts the doctrine of *Hill vs. R. R. Co.*, 11 Wis., 214. It approves the principles of law substantially as laid down by Judge Jenkins, and embodied in the mechanic's lien decree, in *National Foundry and Pipe Works, Limited, vs. Oconto Water Company*, 52 Fed., 43 (7 C. C. A., 603).

It holds that a mechanic's lien will lie against the whole or a part of the property of a *quasi* public corporation under the statutes of Wisconsin in certain cases, and in certain cases that it will not. The determination of any action brought for the purpose of enforcing such lien depends upon a question of fact and not of law. The lien will lie if its enforcement will not work a destruction of the "corporate franchises" or "corporate functions created as an entirety and primarily for the benefit of the public."

The logical result of this latest expression of opinion of the Supreme Court of Wisconsin is that if the plant as an entirety, including its franchise to operate, is not to be dismembered but is to pass without destruction or impairment to the purchaser at the sale so that the public will not be injured, the court in decreeing the enforcement of the lien against the property does

not "repeal *pro tanto* the charter of a corporation so created primarily for the public benefit," and in such a case the statute gives a mechanic's lien.

It also follows that if the part of the plant against which the lien is sought "may be replaced and is not indispensable" (115 U. S. page 135) *to the operation and maintenance of the plant as operated and maintained at the time of the commencement of the work of construction on such part,* a lien will lie against it although such new structure is essential, and is built, to operate the plant when completed or enlarged in accordance with the designs of the corporation, and although the enforcement of the lien by judicial sale in the suit after the plant is so completed or enlarged may result in the dismemberment of the plant, unless the decree for the sale provides that all the property with the franchises of operating the same be sold as an entirety.

It must be conclusively presumed that the mechanic's lien by virtue of which the plaintiff in error claims its title was authorized by the statutes of Wisconsin, and that the decree of the federal court recognizing and enforcing it must be given its full legal force and effect.

Milwaukee, Wis., July 6, 1901.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

No. 33.

OFFICE SUPREME COURT of U. S.
RECEIVED
FEB 4 1902

Petition for Rehearing.

Rec'd Feb. 4, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 208. 33

THE NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

PETITION FOR REHEARING.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

EVENING WISCONSIN CO., PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES

October Term, 1900.

No. 216.

THE NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

The plaintiff in error respectfully petitions the Court for a rehearing upon the following grounds:

Prior to the commencement in the state court of the suit at bar, an action was begun by the plaintiff in error in the federal court seeking to pay off and redeem the mortgage given to Andrews and Whitcomb. Such action is now pending in the United States Circuit Court of Appeals.

The action to redeem was brought by the plaintiff in error upon the theory that the right to do so had been recognized in the creditors' suit and that the decree therein was not *res adjudicata* as to this right. The reasons for this conclusion are as follows:

Upon the original argument of the creditors' suit in the Court of Appeals (46 U. S. App., 205), counsel for the mortgagees contended in their brief that "if the

complaining creditors have any equity to relief against any securities of Andrews and Whitcomb or the judgment of foreclosure and sale or the possession under them, there being no fraud, collusion or estoppel, it could be granted only on a bill to redeem. * * * This is not such a suit and should have been dismissed." In the petition for rehearing in that case appellee's counsel contended that it should have the right to redeem from the mortgage under the bill as framed and under the prayer for general relief, or under such amendments to the bill as would authorize the court to grant such relief. The contention was not only that it had a valid judgment at law but that it had a valid adjudication in the mechanic's lien suit, not only of the amount due the complainant but of a valid lien as against the mortgagor and that it ought to be allowed to pay off and redeem the mortgage. The point was thus stated in the petition for rehearing:

> "If it be held that they cannot enforce the mechanic's lien decree adversely to Andrews and Whitcomb, certainly they can use such lien to entitle them to redeem the mortgage."

It was as to this contention of the right to redeem that Judge Woods in his opinion stated:

> "The question whether appellees as judgment creditors of the Oconto Water Company have a right to redeem from the sale made to Andrews and Whitcomb upon their foreclosure decree to which the appellees were not parties, does not in our opinion arise in this record and will not be prejudiced by our decision."

When the mandate was sent down to the Court below the question of the right to redeem was again presented to his Honor, Judge Jenkins, and in the written opinion filed he expressly said that the appellee "should be placed in a position to be able to redeem," and so it was provided in the final decree that the transfer of the title by virtue of the mortgage foreclosure proceedings to the Oconto City Water Supply Company, should be

"without prejudice to any rights which said complainant or said R. D. Wood & Company may have under their said mechanic's lien decrees to redeem from said instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same."

Relying on this right to seek relief by means of redemption unprejudiced by the proceedings in the creditors' bill suit, the plaintiff in error filed its bill to redeem, setting up its judgment at law and in the mechanic's lien suit against the Oconto Water Company and such other facts and asking such relief as are necessary and proper in a suit of that nature.

In this connection we desire to call attention to the fact that the Supreme Court of the state in the action at bar also recognized the right of the appellant to redeem in the opinion filed, wherein it is said "the appellant's lien having been adjudged void as to respondent, and it being conceded or undisputed that respondent is legally in possession of the mortgaged property with at least the rights of mortgagees so circumstanced, it cannot be ousted from that possession *without payment of the mortgage indebtedness.*" (105 Wis., 65.)

The assignments of error in the case at bar do not raise the question as to whether the plaintiff in error's right to redeem was barred by the decree in the creditors' suit. But counsel for defendant in error in the brief filed raised the contention that "there is no right to redeem under the general prayer for relief." In the brief of plaintiff in error in reply it was said that the question of the right of redemption was not involved in the decision of the case, inasmuch as the defendant in error presented no such issue by its answer in the court below. Some authorities were, however, referred to upon the proposition that had such an issue been presented, the right to redeem would lie in favor of the plaintiff in error because it had a valid lien as against the mortgagor, and had acquired the mortgagor's equity of re-

demption by foreclosure of its prior lien, which equity had not been foreclosed in the mortgage foreclosure suit. A consideration of the authorities cited was unnecessary, inasmuch as the point suggested was not a federal question, nor was the question a federal one as to whether the state court was justified under the pleadings in granting affirmative relief. Upon this latter question the state court simply ruled that the judgment in the case at bar did not grant affirmative relief, but that it amounted in substance only to a judgment of dismissal of the plaintiff's complaint. (105 Wis., 69.)

Our contention is therefore that the question of the right of the plaintiff in error to pay off, and redeem from, the mortgage was not, and was not intended to be, adjudicated in the creditors' suit. Furthermore, that such question was not at issue in the suit at bar and should be left unprejudiced by any opinion upon the same, or that the opinion should expressly state that the right to redeem was not considered nor adjudicated in the creditors' suit.

The doctrine that a judgment in a suit to set aside a mortgage decreeing the mortgage to be valid and the title of the plaintiff to be invalid as against the mortgagee, will not prevent the filing of a subsequent bill by the holder of such invalid title to redeem the mortgage was first announced in *Rand vs. Cartwright*, 1 Ch. Cas., 59, in which the opinion was as follows:

> "A man makes a voluntary deed and then a mortgage of the same lands. The first deed upon trial at law is found fraudulent; he to whom the deed is made exhibits a bill to redeem the mortgage. It is held that the first deed was fraudulent, because voluntary *quoad* the mortgage money and *pro tanto*, yet that it was good as to the equity of redemption, and would pass that, for that a voluntary deed will bind the party that makes it and his heirs."

See 1 *Powell on Mortgages*, 261.

See additional cases cited on pages 8 and 9 on brief of plaintiff in error in reply, on file.

The bill in the creditors' suit was not filed for redemption, nor could a decree be founded on it that the complainant therein should be let in to redeem.

The complainant assailed the validity of the mortgage and the foreclosure sale and asserted a lien paramount thereto. The averments therein were adapted only to the establishment of the mechanic's lien as paramount to the mortgage and to the cancellation of the mortgage because of its alleged invalidity. These averments were not only unnecessary but were repugnant to and inconsistent with averments necessary to a bill to redeem. Had the bill in the creditors' suit raised by its averments the issue as to the right of the complainant to redeem as well as the issue of the validity of the mechanic's lien and the invalidity of the defendant's mortgage, the bill would "have been properly dismissed at the hearing by the Court *sua sponte* for multifariousness."

Merriman vs. Railroad Co. (U. S. Ct. App., 7th Cir.), 24 U. S. App., 428-456.

In the case last cited it is held that a bill containing the allegations of a creditor's bill and also allegations of a bill for redemption, states "two inconsistent causes of action and the right to recover upon one theory is destructive of the right to recover upon the other. Such a bill cannot be maintained. It would be multifarious and self-contradictory." (*Supra*, pp. 455-6.)

The court cited with approval the language of the opinion in *Micou vs. Ashhurst*, 55 Ala., 607-12, where speaking of a creditor's bill it is said that "the bill is not filed for redemption; *nor could a decree be founded on it that the complainant be let in to redeem.* The averments of the bill are adapted only to a decree for the cancellation of the mortgage, because the debt is founded on an illegal consideration. As a general rule

a bill may be framed in a double aspect, or in the alternative, when either of the aspects or alternatives entitles the complainant to the same relief. But we do not understand that, when a bill is filed for a distinct purpose, which wholly fails, whether on the facts stated, or on the proofs, it can be converted into a bill for another purpose." (*Supra*, p. 458.)

It is conceded that there were no averments in the bill in the creditors' suit upon which a decree could have been founded to let the complainant in to redeem, and that the issues in such case made by the pleadings were not such as would entitle the complainant in the creditors' suit to any such relief. How, then, can it be said that the decree in that suit adjudicated that the complainant was not entitled to the right to redeem?

> "Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required, it will be limited by construction so that its effect shall be such and such only as is needed for the purposes of the case that has been made and the issues that have been decided."
>
> *Graham vs. R. R. Co.*, 3 Wall., 704.
>
> *Barnes vs. R. R. Co.*, 122 U. S., 1, p. 14.

> "A judgment to be conclusive upon the parties to the litigation must be responsive to the matters controverted," * * * " to the issues tendered by the pleadings," otherwise it "will be treated as a nullity."
>
> *Reynolds vs. Stockton*, 140 U. S., 254-70-1.

Nor should the plaintiff in error be held to be estopped from bringing its suit to redeem, under the doctrine of election. While it is true that where there exists an election between inconsistent remedies, the party is confined to the one which, with knowledge of his rights, he first adopts, yet "if plaintiff was mistaken and undertook to avail himself of a remedy that he was never entitled to, this does not estop him from

subsequently availing himself of a remedy that he is entitled to under the facts of the case."

Agar vs. Winslow, 123 Cal., 587.
Bunch vs. Grave, 111 Ind., 351.
McQueen's Appeal, 104 Pa. St., 595.

The plaintiff in error mistakenly supposed it had a lien which it could enforce adversely to the rights of the mortgagees. The judgment to the contrary should not be held to deprive it of the right to recognize the mortgage as valid and to pay it. The remedy which it has by redemption, if any, should not be prejudiced by the fact that it assumed to rely on the doctrine established in the state and federal court that a mechanic's lien would lie against the property of a quasi-public corporation, and on the fact that such doctrine would not be changed by subsequent decisions of those courts. The doctrine was changed and the remedy of the complainant in the creditors' bill suit found fruitless. The only remedy left is the one invoked by the plaintiff in error in the suit to redeem.

It is respectfully submitted, therefore, that the question of the right of the plaintiff in error to maintain a bill to pay off and redeem the mortgage should be left unprejudiced by the decision of this case, and that the opinion of this court in terms should so declare. This would perhaps require some modification of the following portion of the opinion filed:

> "The claim that because by the thing adjudged it is indisputable that the Pipe Works had a lien against the Water Company, it therefore follows that there is still a right to redeem as against Andrews and Whitcomb and the Water Supply Company, even although it was established by the effect of *res judicata* arising from the creditors' suit, that the lien as to the parties named was inoperative and a nullity, is but another form of asserting that the decree in the creditors' suit was not *res judicata* between the Pipe Works and Andrews and Whitcomb and the Water Supply Company."

If, however, it be held that the question of the right of the plaintiff in error to redeem is one that may properly be determined by this court upon this record instead of being left for determination by the court in which an action for that purpose is now pending, a rehearing is respectfully prayed in order that the arguments on that question may be fully presented.

NATIONAL FOUNDRY AND PIPE WORKS, LTD.,
Plaintiff in Error.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in point of law.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

No. 216.

Brief of Greene for D. E.

Office Supreme Court U. S.
FILED
MAR 12 1901
JAMES H. MCKENNEY
Clerk.

Filed Mar. 12, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 216.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
PLAINTIFF IN ERROR,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR DEFENDANT IN ERROR.

GEO. G. GREENE,
Counsel for Defendant in Error.

E. ADDY & SON, GREEN BAY, WIS.

Supreme Court of the United States

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error

BRIEF FOR DEFENDANT IN ERROR.

I

The federal question.

The bill alleges and the answer admits that, on or about Aug. 28, 1890, the plaintiff in error furnished the Oconto Water Company, a corporation of Wisconsin, iron pipe necessary to be used, and which was used, in the construction of its water works plant; that on Jan. 28, 1891, plaintiff in error filed its claim for a lien, under the statute of Wisconsin, on such plant for such claim, and on Jan. 30, 1891, began suit in the United States Circuit Court for the Eastern District of Wisconsin, against said Oconto Water Company only, to foreclose such lien; that on Oct. 3, 1892, decree was entered in such suit for such lien for the sum of $24,250.04, and that such plant *and the franchise to operate it* be sold pursuant to the state statute to satisfy the lien; and that, on Aug. 23, 1897, pursuant to said decree, the marshal did sell the plant and franchise to plaintiff in error for $500, and that on Aug. 28, 1897, the sale was confirmed and a marshal's deed thereon executed

to it. The bill claims that by such deed, the plaintiff in error became the owner of the plant and franchise by title *prior* to any lien or title of defendant in error (Trans. pp 14 and 15, 20).

The bill further alleges and the answer admits that, on Sept. 18, 1890, the Oconto Water Company executed a mortgage of its right and franchise to construct, maintain and operate said water plant, to S. D. Andrews and W. H. Whitcomb, and, on March 13, 1891, executed a second mortgage to them of such right and franchise; that on June 17, 1891, said mortgagees began suit against said mortgagor in the proper state court to foreclose said mortgages, and that, on Aug. 13, 1891, judgment of foreclosure and sale in said suit was rendered; that on such foreclosure sale the mortgaged property was bid in by said Andrews and Whitcomb; that thereupon said purchasers took possession of the plant and continued in possession until July 25, 1892, when they transferred the purchased property to defendant in error; and that thereupon the defendant in error took possession of the plant and has ever since been in possession of it. It is undisputed that such foreclosure sale was duly confirmed by the state court (Trans. pp 16, 168).

The bill alleges that defendant is a corporation of Wisconsin organized by Andrews and Whitcomb, as such foreclosure purchasers, to take and operate such plant, pursuant to section 1788 R. S. of Wisconsin; and that Andrews and Whitcomb took their mortgages and purchased on foreclosure, and that defendant in error purchased from them, knowing that plaintiff's pipe had gone into the construction of the plant and was not paid for (Trans. pp 13, 17).

The prayer of the bill, as amended, is for judgment (1) against defendant in error for the value of said pipe and the amount of its lien, (2) that possession and use of the plant be given to plaintiff in error, (3) that defendant in error be enjoined from possessing or using it or the pipe absolutely, or unless defendant in error pay to plaintiff in error the amount of its lien, within a time to be fixed by the court. (Trans. pp 17, 25,26).

The answer, as amended, among other things, avers, and this is undisputed, that on Oct. 5, 1896, a judgment was rendered in the Circuit Court of the United States for the Eastern District of Wisconsin, in a suit wherein the plaintiff in error was complainant and S. D. Andrews, W. H. Whitcomb, *the defendant in error*, the city of Oconto and others were defendants, whereby it was adjudged that the lien decree against the Oconto Water Company only, alleged in the bill, was of no effect against Andrews and Whitcomb or the defendant in error and that, as to them and all the world except the Oconto Water Company, the plaintiff in error never had any lien. (Trans. pp 27 to 29). The judgment thus set up was found by the trial court and the finding was affirmed (Trans. pp 169, 173, 144). The suit, in which it was rendered, was a creditor's bill founded on the return unsatisfied of an execution on a judgment at law for the same debt for which the lien decree was rendered. It was begun Jan. 18, 1892, and sought to sequester the water plant and franchise and to apply them to liens according to their priority and to unsecured creditors. The bill alleged that the foreclosed mortgages were fraudulent and void. After the lien decree of Oct. 3, 1892, the bill was amended to allege it. (Trans. p 130) The answer to the amended bill in the creditor's suit claimed that such decree had no effect as to Andrews and Whitcomb and defendant in error, because they were not parties to the lien suit. (Trans. pp 131, 133). Thereupon the bill was again amended to set up all the facts on which a lien was claimed, precisely as in the lien action. (Trans. pp 134, 135). There was a general replication. The creditor's suit was tried on these issues. Before the hearing but after the lien decree, the State Supreme Court decided that there was and could be no mechanic's lien on the water plant and franchise. *Chapman Valve etc. Co. vs. Oconto Water Co.* 89 Wis. 264. This decision the United States Circuit Court of Appeals followed in the creditor's suit, and it held that plaintiff in error had no lien on the plant or franchise as against the defendant in error or Andrews and Whitcomb, by the lien decree or otherwise; that by the statute of Wiscon-

sin, there could be no lien on such property; that Andrews and Whitcomb and defendant in error were neither parties nor privies to the lien decree and hence not affected by it; that the foreclosed mortgages embraced the plant as well as the franchise; and that their foreclosure in the state court was valid and gave defendant in error good and paramount title. *Andrews vs. Nat. Foundry etc. Co.* 46 U. S. App. 281, 619. The decree in that case was final (Trans. p 144).

In the court below, plaintiff in error contended for the relief prayed in its bill, viz, in substance, (1) payment of its claim for pipe by defendant in error or (2) possession of the plant absolutely or until payment, on these grounds: 1. That defendant in error having been organized, as a corporation under the state law, to take and operate the property sold on the mortgage foreclosure, was the successor of the Oconto Water Company in such sort as to be liable for its debts and was, hence, liable for the debt for this pipe. 2. That defendant in error was liable for such debt, because both Andrews and Whitcomb and itself bought the property knowing that the pipe went into the construction of the plant and was not paid for. 3. That the decision of the federal court in the creditor's suit that the lien decree gave no lien and there was none, as to the defendant in error and Andrews and Whitcomb, did not involve the right of plaintiff in error to hold defendant in error liable for its claim upon the the ground that the latter took the property subject to the lien claim. 4. That the foreclosure of the mortgage in the state court was without jurisdiction, because at the time it was begun and of the sale and confirmation, the suit to foreclose the mechanic's lien was pending in the federal court. 5. That the judgment appealed from should not have given affirmative relief.

1. Manifestly the first contention involves no federal question. The only question it presents, if it can be seriously called a question, is whether a corporation, organized under the particular state statute, to buy the property of another corporation sold on the foreclosure of

a mortgage made by it, is thereby liable for the unsecured debts or junior incumbrances of the mortgagor.

2. So, the second contention raises a question of general law only, viz, does one who buys on the foreclosure of a mortgage become liable for the debts of the mortgagor, which were for the betterment of the mortgaged property to the knowledge of the purchaser when he bought. The claims of the plaintiff in error, in the first two contentions, were wholly irrespective of the lien decree of the federal court.

3. The third claim presents the question, whether the determination in the creditor's suit is *res adjudicata* herein that plaintiff in error has no lien as against the defendant in error, either by the lien decree or otherwise. Although the decrees in the lien and creditor's suits were by federal courts, the mere question whether, and to what extent, the latter was a bar was not therefore federal.

Choteau vs. Maffit, 111 U. S. 200.
San Francisco vs. Itsell, 133 U. S. 65.

Besides, the plaintiff in error conceded below that the decision in the creditor's suit was conclusive that the lien decree gave no lien and that plaintiff in error had none, as to defendant in error and Andrews and Whitcomb. It said in its brief that the decree in the creditor's suit determined that "Andrews and Whitcomb and the Oconto City Water Supply Company, not having been parties to the mechanic's lien suit, were not bound by such lien decree," and that plaintiff in error "had no lien upon the property as against Andrews and Whitcomb's mortgages, and therefore could not question the validity of the title obtained through their foreclosure." And the court below said: "It is conceded that, under that rule [res adjudicata], it was not open for appellant in this case to litigate the question of whether its lien judgment was binding on the respondent" [defendant in error]. Again the court said: "Appellant's counsel concedes that the effect of the decree [in creditor's suit] is that their claim was not a lien upon the water company's property as against Andrews and Whitcomb's mortgages. With that concession,

there was nothing left undecided, as it seems, which is involved in this case." (Trans. pp 182, 183). If there was thus no question whether the decree in the creditor's suit was conclusive that there was no lien as against defendant in error, what question as to the effect of the federal decrees was there?

4. The question whether the mortgage foreclosure in the state court was void, because foreclosure of the mechanic's lien was then pending in the federal court, may be, in form, federal. But, as the court below said, it is immaterial. The mortgages were valid. Defendant in error was in possession, through an attempted foreclosure. If, for any reason, the foreclosure was void, it still had the right of possession.

Bryan vs. Brasius, 162 U. S. 415.
Bryan vs. Kales, 162 U. S. 411.
Cunningham vs. R'y. Co., 156 U. S. 400.
McCormick vs. Herndon, 78 Wis. 661, 664.

The court below pertinently said: "It being conceded or undisputed that respondent [defendant in error] is legally in possession of the mortgaged property, with at least the rights of mortgagees so circumstanced, it cannot be ousted from that possession without payment of the mortgage indebtedness, nor can it be made to pay junior liens as a condition of enforcing its primary right" (Trans. p 183).

5. The question whether the judgment should give affirmative relief is not federal.

There must be a *real* federal question to give this court jurisdiction.

Hamlin vs. Land Co., 147 U. S. 531.
New Orleans vs. Waterworks Co., 142 U. S. 79.
Millinger vs. Hartupee 6 Wall, 258.

"Otherwise a federal question might be set up in almost any case." 142 U. S. 79. The only federal authority that appears in the case is the action of the federal courts in the lien suit and the creditor's suit. When plaintiff in error concedes that under this authority, it has no me-

chanic's lien as against the defendant in error, the only *real* question is, must the latter pay the unsecured debt for this pipe or surrender possession, either because (1) it is the corporate successor of the Oconto Water Co. or (2) bought the plant knowing of such debt.

But we proceed briefly to consider the claims of plaintiff in error, assuming that they involve a substantial federal question.

II

Plaintiff in error cannot recover on the ground that it has any lien or title.

I It is *stare decisis* in the state court and *res adjudicata* between these parties that plaintiff in error never, in fact, had any lien, and had none by judgment estoppel, against defendant in error.

Chapman Valve Co. vs. Oconto Water Co. 89 Wis. 264.

Andrews vs. Nat. Found. etc. Co. 46 U. S. App. 281, 619.

Buncombe vs. R'y. Co. 115 U. S. 128.

C. and N. W. R'y. vs. Forest County 95 Wis. 89.

The doctrine is thus stated: "The franchises and rights of a quasi public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold, on execution, or for mechanic's liens, or on tax process." 95 Wis 89.

In *Andrews vs. Nat. Found. etc. Co.* 46 U. S. App. 281, 619, wherein the question arose *between the parties hereto* for the first time, plaintiff in error set up in its bill the lien decree and also the special facts on which it claimed a lien. (Trans. pp 130, 134, 135). The answer denied the right to lien. The bill prayed that the mortgages "be adjudged null and void" and that plaintiff in error and an

intervenor "*be decreed to have mechanic's liens* against the property and franchises of the Oconto Water Company, and that such lien be adjudged prior in time to any lien or encumbrance on said property asserted or claimed by or on behalf of * * * Andrews and Whitcomb" (Trans. p 135). The answer also set up the mortgages and their foreclosure, and the sale of the mortgaged premises to Andrews and Whitcomb and defendant in error. The plaintiff in error took issue on this by general replication. (Trans. pp 95 to 97, 129). The court decided that there was no lien as to Andrews and Whitcomb and defendant in error, and that the mortgage foreclosure gave paramount title. On rehearing in was claimed that the lien decree bound Andrews and Whitcomb and defendant in error by *lis pendens*. But the court said: "They purchased upon the foreclosure of their own mortgage, which antedated the commencement of the suit of the lien holders, and *the title which they obtained related back to the date of their mortgage*. The doctrine of *lis pendens*, as we conceive, does not apply." 46 U. S. App. 281, 619. This is the settled law.

Corsair vs. Kincaid, 40 Minn. 467.
Horn vs. Jones, 28 Cal. 195.
Jaycox vs. Smith, 45 N. Y. Sup. 299.
Bank vs. Taylor, 131 Ill. 376.
Dull vs. Blackman, 169 U. S. 243, 248.
13 *Am. and Eng. Enc. of Law*, 899.

Plaintiff in error also claimed, on rehearing, that the mortgages did not include the plant and that the foreclosure sale, although confirmed, was void because made within the period of redemption. The court overruled both contentions. 46 U. S. App. 619.

The questions as to whether plaintiff in error had any lien by decree or otherwise, whether the mortgages were foreclosed, and whether the foreclosed title was paramount, were distinctly raised by the pleadings and decided. Both the record and the opinions show this. The rule in such cases is thus stated in *R'y. Co. vs. U. S.*, 168 U. S. 1, 48:

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

New Orleans vs. Bank, 167 U. S. 371, 396.

The plaintiff in error having no lien as to defendant in error, it follows that the marshal's deed gave no title or interest. The whole interest had then vested in defendant in error under the paramount mortgage.

II. If plaintiff in error has any lien paramount to the mortgage or title under it, its remedy at law is adequate.

With such lien, the marshal's deed gives paramount title, on which plaintiff in error could maintain ejectment. Where, as here, the plaintiff in error seeks legal relief—possession of the property and a money judgment—and shows no distinctive ground of equitable relief, the objection is not waived by failure to answer or demur.

Burnham vs. Norton, 100 Wis. 13.
Stein vs. Benedict, 83 Wis. 603, 616.
Trustees vs. Kilbourne, 74 Wis. 452.
Avery vs. Ryan, 74 Wis. 599.
Sullivan vs. R'y. Co., 94 U. S. 806, 811.

III. There is but one alternative to this conclusion. It may be claimed that there is a paramount lien by the lien decree against the Oconto Water Co. only, and that the object of this suit is to enforce or get some benefit of such lien against one not a party to the decree. The suit, in that aspect of it, concedes that the lien decree cannot be enforced against defendant in error, because not a party, by the regular process of the court in the lien suit. Therefore, plaintiff in error returns to a court of equity in a new suit and asks it by a new decree to compel defend-

ant in error to surrender the plant or pay the debt, because of the erroneous decree and in satisfaction of the lien which it adjudges. Without that decree, plaintiff in error confessedly has no lien. With it, it claims that it has some equity to a lien against a stranger, which, although unenforceable by regular process upon the decree, equity should enforce, by compelling such stranger to pay the lien. It is, in effect, an attempt to make defendant in error a party to, and bind it by, the lien decree. Equity will not do that. "When the common process of the court will not serve, but a new bill and new decree is become necessary" to enforce a former decree, equity will not give relief if the former decree is erroneous.

Lawrence Mfg. Co. vs. Cotton Co., 138 U. S. 552.
Woodhouse vs. Gay, 73 Ill. 415, 430.
Gay vs. Parport, 106 U. S. 679.
Comptom vs. Jessup, 68 Fed. Rep. 263, 314, 315.
2 *Beach Equity Juris.*, Sec. 904 and cases.
3 *Enc. of Pl. and Pr.*, 604 and notes.

In *O'Connel vs. McNamara*, 3 D. & W. 411, Sugden L. C. said: "I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit of a former decree, he must be prepared to show that such decree was right." In *Lawrence vs. Berney*, 2 Ch. Rep. 127, the court said: "When the common process of the court will not serve, but a new bill and new decree is become necessary to have the execution of the former decree, which is in itself unjust, then this court desired to be excused, in making it its own act, to build on such ill foundation." This court declares the doctrine thus: "When a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree, as respects the relief granted by the new bill." 138 U. S. 552. The extraordinary aid of equity will not be given to enforce or perpetuate an error. The principle has special force where, as here, the error of the decree has been determined by the state and federal courts, in suits between

the parties, and consists *in declaring a lien contrary to the public policy of the state.* To give the relief here prayed for, in effect enforces a mechanic's lien on this plant; against that policy. The plant and franchise are instrumentalities of the state in the hands of its agent, for public use.

Olcott vs. Supervisors, 16 Wall 594.
Chapman Valve Co. vs. Water Co., 89 Wis. 272.
Cohen vs. Boom Co., 47 Wis. 324.
East Ala. R'y. vs. Doe, 114 U. S. 350.
Buncombe vs. R'y. Co., 115 U. S. 128.

To grant the relief asked is to transfer the possession of the plant and franchise from such agent to the plaintiff in error, a foreign company, unless defendant in error pays the debt; in substance what the enforcement of a lien would do and what, by the public policy, cannot be done.

III

Plaintiff in error cannot recover unless it had a paramount lien.

I. Defendant in error is not liable as the successor of the Oconto Water Company.

Section 1788 R. S. provides:

"Any person or association of persons, which shall have, or may hereafter, become the owner or assignee of the rights, powers, privileges and *franchises* of any corporation * * by purchase under a mortgage sale * * may, at any time within two years of the said purchase * * * organize anew by filing articles of organization as provided *in this chapter*, or elsewhere in these statutes respecting corporations for similar purposes, and shall thereupon have the same rights, privileges and franchises which such corporation had, or was entitled to have, at the time of such purchase and sale and such as are provided by these statutes applicable thereto. They may fix at what price or for what number of shares the rights, privileges, powers, franchises and property of such former corporation, purchased by them, shall be put into the new organization."

Defendant in error organized under chapter 86, pursuant to this provision. The plant and franchises conveyed to Andrews and Whitcomb on foreclosure of their mortgage, on September 12, 1891, were on July 25, 1892, conveyed to defendant in error. Plaintiff in error claims that by such organization and transfers, defendant in error took the franchise of the Oconto Water Company *to be a corporation*, as well as the plant and franchise to operate it; and that thereby it *is* the Oconto Water Company and, hence, liable for its debts. The object of such statutes, as is said in 4 *Am. and Eng. Enc. of Law* (1 Ed.) 272 i, is to provide for "the formation of an entirely new corporation for the purpose of purchasing the property of another corporation, and superseding it in business, *without incurring any liability to its creditors.*" The argument of plaintiff in error concludes that a statute, thus in aid of corporate securities, makes them worthless; precludes a mortgagee from enforcing his security, on pain of becoming liable for all junior liens and unsecured debts; makes secured debts insecure and unsecured debts secure. If plaintiff in error has the paramount lien and has or gets title on it, and organizes under section 1788, it will be liable, on this argument, to pay the mortgage debt of $64,000. Which of these parties is bound to pay the debt of the other, depends on which is so unfortunate as to have the paramount lien or title. "It would entirely defeat and destroy the value of mortgage security upon corporate property, if the mortgagees, obliged to become purchasers of the property at a foreclosure sale, could organize themselves into a corporation for the purpose of managing it only upon the condition of assuming the floating debts of the old company. The result would simply be to oblige the secured creditors to pay the debts due to the unsecured creditors. Or, as Mr. Justice Cooper quaintly remarked, it 'would be a practical illustration of the query 'does prohibition prohibit' in the form of 'does security secure' ". 1 *Thompson Corporations* Sec. 263.

It is the settled law that a corporation which *succeeds* to the property and franchises of another corporation by purchase is not liable for its debts.

Neff vs. Boom Co., 50 Wis. 585.
Menasha vs. R'y. Co., 52 Wis. 414.
Pennison vs. R'y. Co., 93 Wis. 344, 346.
Wright vs. R'y. Co., 25 Wis. 46, 53.
Child vs. R'y. Co., 129 Mass. 170.
Hoard vs. R'y. Co., 123 U. S. 222, 226.
Water Co. vs. Mogens, 79 Tenn. 37.
1 *Thompson on Corp.*, Sec. 263.

The cases relied on by plaintiff in error have no bearing. (1) In those opinions from which phrases are wrenched to show that there is a tradition of the franchise *to be* a corporation from one corporation to another, the courts were either not considering that franchise but the franchise *to operate*, or there was a *consolidation* of corporations rather than a *succession* of property by one corporation from another by *purchase*. (2) In every case in which a foreclosure purchaser was held to pay a claim, the claim was a paramount lien, or an interest in land paramount to the mortgage, or under a contract which the mortgagee or purchaser had assumed. Thus, in *R'y. Co. vs. Bonney*, 117 Ind. 501, 20 N. E. Rep. 422, the opinion states that "after Bonney *had acquired his lien*, the franchises and property of the railroad company were sold in pursuance of a decree foreclosing a trust mortgage which has been executed by the railroad company, but *which was a junior lien to that of Bonney*." Of course, the new company took subject to the paramount lien. The court simply held "that as the debt remained unpaid, the *lien* afforded the basis for the exercise by the equity court of its jurisdiction to coerce payment." It is idle to cite such cases. If plaintiff in error, as in that case, has a lien senior to the mortgage, there is no question. But it concedes and it is *res adjudicata* that it has no lien at all as against the mortgage.

II. Defendant in error is not liable because it bought knowing that the pipe went into the plant.

If the proposition that it is thus liable is sound, it must also be true that if Andrews and Whitcomb had

had no mortgage, or if it was void as was contended, and plaintiff in error had had a valid lien, it would have been liable to pay Andrews and Whitcomb's debt of $64,000, which went into the construction of the plant, since it purchased on its lien foreclosure knowing that fact. The argument, like the one from corporate succession, comes to the conclusion that the better one's security is, the less he is secured.

A purchaser's rights on foreclosure are not affected by knowledge of claims for the betterment of the mortgaged property, which are not liens paramount to the mortgage. This is so whether the consideration for the unsecured claims or junior liens went for the construction, existence or repair of the mortgaged property. It is so whether the purchaser is a natural person or a corporation. "As the purchaser at the foreclosure sale, in nearly all cases, organizes a new corporation, under enabling statutes, to hold and operate the railroad property, such new corporation takes it *free from liability for all debts* of the mortgagor corporation which are not secured upon the property *by a lien paramount to the mortgage.*" 5 *Thomp. Corporations*, Sec. 6237.

R'y. Co. vs. Cowdry, 11 Wall. 482.
Cowdry vs. R'y Co., 93 U. S. 352.
Wood vs. Trust Co., 128 U. S. 417, 421.
Kneeland vs. Trust Co., 136 U. S. 89, 97, 98.
Iron Co. vs. Trust Co., 79 Fed. Rep. 202, 210.
Trust Co. vs. R'y. Co., 80 Fed. Rep. 624.
Raht vs. Attril, 106 N. Y. 423.
Ellis vs. R'y. Co., 107 Mass. 1, 17.
Hale vs. R'y. Co., 60 N. H. 333.
Hooper vs. Trust Co., 32 Atl. Rep. 505 (Md.).

Mr. Justice Brewer: "One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his *vested* and *contracted priority*, as the holder of a mortgage on a farm lot." 136 U. S. 97. The New York court of appeals: "The lien of the mortgage attaches not only to the land in the condition in which it was at the time of the execution of the

mortgage, but as changed or improved by accretion, or *by labor expended upon it while the mortgage is in existence.* Creditors having debts created for money, labor or *materials* used in improving the mortgaged property, acquire, on that account, no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection." 106 N. Y. 432. Mr. Jones: "A claim for *materials* furnished an insolvent railway company, *which is not a lien by virtue of any statute*, is not entitled to payment out of the fund arising from a sale of the property at the instance of prior mortgage bondholders, until the bonds are paid." *Corp. Bonds and Securities*, Sec. 587.

A mortgage is thus supreme and the mortgagees and those under them are thus free from liability, whether the improvement of the mortgaged premises precedes or follows the execution of the mortgage. The mortgage when executed embraces the property in its *then* improved condition, and also embraces all subsequent improvements, free from *unsecured debts and junior secured debts*, for the improvements. Where there is no lien for improvements, they can never give any right against a mortgage which thus embraces them, either of payment, redemption or other relief. A mortgage would be a barren security were this not so. And there never is any lien for improvements, *save by statute or contract.* There is no such lien in *equity.*

2 *Jones on Liens*, sec. 1184.
Ellison vs. Jackson Water Co., 12 Cal. 542.
Rees vs. Luddington, 13 Wis. 276, 279.
Wilson vs. Rudd, 70 Wis. 98, 103.
Mushlett vs. Silverman, 50 N. Y. 360.
Benton vs. Wickire, 54 N. Y. 226.

By mistake, the mortgage was not recorded for a few weeks. But as to creditors not obtaining a lien before it was recorded, that is immaterial. It is also immaterial as to one who obtains a *mechanic's lien* after the execution, before it is recorded.

Mathwig vs. Mann, 96 Wis. 213.
Rees vs. Luddington, 13 Wis. 276.

It must, therefore, be immaterial as to one who is a mere unsecured creditor. It was found in the lien suit that there was no fraud in not recording the mortgage or otherwise. *Nat. Found, etc. vs. Water Co.*, 68 Fed. Rep. 1006, 1013. And it was determined in the creditor's suit, between these parties, that the mortgage was valid and paramount to the alleged lien of plaintiff in error. 46 U. S. App. 281, 619.

In the cases relied on by plaintiff in error, the claimant had some lien or interest in the property paramount to the mortgage. No case is produced which rules that a foreclosure purchaser must pay unsecured claims or junior liens for betterment, or that betterment, without statute, gives any ground for relief against a mortgage.

IV

The state court had jurisdiction of the suit to foreclose the mortgages.

1. This is not material. If, as was determined in the creditor's suit and as is conceded, the mortgage was paramount, it matters not whether it was foreclosed. Without foreclosure, the mortgagees or those under them cannot be made to pay an unsecured debt or junior lien, or to deliver possession to one who has not a paramount claim. The defendant in error, as purchaser under foreclosure, even if such foreclosure was void, is entitled to the possession, as against those not having paramount claims, *until the mortgage debt is paid.*

Bryan vs. Brassius, 162 U. S. 415.
Bryan vs. Kales, 162 U. S. 411.
Cunningham vs. R'y. Co., 156 U. S. 400, 425.

2. The question is concluded by the decision in the creditor's suit. The complaint, judgment, sale, deed and confirmation were set forth in full in the answer in that suit. (Trans. pp 95 to 97, 121 to 127). Plaintiff in error challenged the foreclosure title for fraud in the mortgages, because they embraced the franchise and not the plant, and because the sale was within the period of re-

demption. It had its day in court in that suit on the question of the validity of that title. It cannot now raise the question, on a ground as fully presented by the record in that case as it is here. The question of the validity of the foreclosure cannot be reopened as often as the wits of counsel can suggest a new reason for their contention.

Cincinnati vs. Emmerson, 57 Oh. St. 132.
Grunert vs. Spaulding, 104 Wis. 193.

"If the defeated party, through the carelessness of himself or attorney, fails to bring to the attention of the court all the reasons or grounds favorable to his contention, he should not be permitted again, on that account, to harass and vex his opponent by bringing forward in a second action the omitted reasons or grounds." 57 Oh. St. 132.

3. Passing the point of res adjudicata, it is clear the state court had jurisdiction of the foreclosure. The only ground on which jurisdiction first exercised in one suit precludes action in another suit between other parties for another cause, is that such action will or may, in some way, conflict with or impair the jurisdiction first assumed. The reason of the rule fixes the limit of its application. Failing possibility of such interference with jurisdiction first taken, each action may proceed regardless of the other. In an action *in rem* all the world are parties; the object of it is to affect, in some way, the status of the *res;* it is begun by taking possession, actual or constructive, of the *res*. Nothing can be done in any other action to interfere with the possession or to affect the status of the *res*, because it would conflict with the jurisdiction of the court over both the *res* and the *parties* in the action in rem. So if possession is taken in an action in personam, to get jurisdiction or to enforce the remedy, it cannot, while it continues, be interfered with by another court in another action, because that would impair jurisdiction first exercised. But where, in actions in personam in different courts between different parties, there is no possession by either court, there is and can be no collision of

authority. Each judgment binds only the parties to it and there is no possession for dispute. This is so although the actions are quasi in rem. In *Freeman vs. Alderson*, 119 U. S. 185, the court, by Mr. Justice Field, said: "Such are actions * * for the enforcement of mortgages and other liens. Indeed all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem in that *the interest of the defendant is alone sought to be affected*, that citation to him is required, and *that judgment therein is only conclusive between the parties.*" That the judgment in such suits only affects the *parties* and *the interest of the defendant in the property* is settled.

Day vs. Micon, 18 Wall. 156, 162.
Dupasseur vs. Rochereaux, 21 Wall. 130, 136.
Hassell vs. Wilcox, 130 U. S. 493.
Dull vs. Blackman, 169 U. S. 243, 248.
McCoy vs. Quick, 30 Wis. 521.
Lampson vs. Brown, 41 Wis. 484.
2 *Black on Judgments*, Secs. 793, 795.
2 *Jones on Liens*, Sec. 1571.

Therefore, in actions quasi in rem in different courts between different parties to enforce different liens, if neither court has possession of the property, nothing that either can do can possibly conflict with the jurisdiction of the other; no more than if the actions were strictly in personam. There is no possession to interfere with. There can be no friction between the judgments; for each only binds the defendant in it and only affects his interest in the property. What that interest is depends on the existence and rank of the lien of the plaintiff in the other action, which the judgment cannot determine or affect. When there has been judgment and sale in each action, the question of what interest of defendant each sale transferred, can only be determined in some suit to which both are parties.

This foreclosure judgment did not bind plaintiff in

error and the lien judgment did not bind defendant in error, as to the existence or priority of the respective liens asserted. Each could dispute the lien of the other because not a party to the suit in which it was foreclosed, in any court, state or federal. Each did so in the creditor's suit. There was no possession, actual or constructive, in either court, during the foreclosure suit. The mortgagor was in actual possession during the whole time. There was no right to take the possession from it, no claim or prayer for possession under the complaint in either action. There was no more reason against the actions proceeding concurrently than successively, as they did in *Hassell vs. Wilcox*, 130 U. S. 493. Had the mortgages been wholly foreclosed before the lien suit was begun or after it ended, the judgment would have been undisputedly valid; yet the question of what interest of the mortgagor it affected, so far as it depended on the existence and priority of the mechanic's lien, would have been precisely the same as it was in the creditor's suit.

The foreclosure decree and sale could not interfere with any right of the court to put the complainant in the lien decree in possession under it by writ of assistance. It could only give possession upon the lien decree, against the defendant therein according to its interest; not as against those not parties to it claiming by paramount right. *Terrel vs. Allison*, 21 Wall. 289. Such possession it could give despite the mortgage foreclosure. If the mortgagor alone was in possession he could be made to deliver it up. But at the date of the lien decree, the mortgagees were in possession claiming right to it, and if their foreclosure were void, they could not be thus evicted.

Bryan vs. Brasius, 162 U. S. 415.
Bryan vs. Kales, 162 U. S. 411.
Terrel vs. Allison, 21 Wall. 289.

The following cases sustain the jurisdiction of the state court to make the foreclosure decree.

Wilmer vs. R'y. Co., 2 Woods 409, 426.
East Tenn. etc. R'y. vs. R'y. Co., 49 Fed. Rep. 608.

Compton vs. Jessup, 68 Fed. Rep. 263, 283.
In re. Hill vs. Stillson, 73 Fed. Rep. 527.
Jenks vs. Brewster, 96 Fed. Rep. 625.
Shields vs. Coleman, 157 U. S. 168.
U. S. Tel. Co. vs. Trust Co., 147 U. S. 431, 448.
R'y. Co. vs. Loan & T. Co., 172 U. S. 493, 515

In the Wilmer case, Mr. Justice Bradley said: "The test, I think, is this; not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. * * * Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property, and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction." 2 Woods, 426. This test has been challenged, but only in so far as it denies jurisdiction of the property without actual seizure, when the object of the suit is to take possession and it is necessary for the relief sought. In such cases, it may be said, that for any other court to take actual possession will cause conflict of orders and judgments in the two courts. On the other hand, it may be said, the seizure by the second court does not conflict with anything the first court has done at the time of seizure; and as the parties are different, what *is* done in the second action should not fail because something *may*, or *is sought* to, be done in the first action which will conflict with it. Be this as it may, no case has ever disputed Justice Bradley's test when possession in the first action was neither had nor sought for and there was no right to take it pending suit. The utmost limit of the doctrine is thus suggested in *Shields vs. Coleman*, 157 U. S. 168:

> "It is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in one court *with the view of the appointment of a receiver*, they may be continued to the completion of *actual possession*, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of proceedure, seize the property, and thus prevent the court in which the proceedings were first commenced from as-

serting its right of possession. * * Of course, the question can fairly arise only in a case in which the process has been served, and in which *the express object of the bill*, or at least *one express object, is the appointment of a receiver*, and *where possession by such officer is necessary for the full accomplishment of the other purposes named therein.*"

Cases are cited for plaintiff in error where the jurisdiction first taken was in proceedings in rem, as *Heidritter vs. Oil Co.*, 112 U. S. 294; where the *parties in both suits were the same;* in bankruptcy proceedings which are in rem and sequester the estate from the filing of the petition; in receiver and attachment suits where property was in actual custody, or in process of being taken into custody; in suits *the parties to which in some other suit* seek conflicting relief as in *F. L. and T. Co., vs. R'y. Co.*, 20 Sup. Ct. Rep. 564. In all these cases, the jurisdiction first taken would be impaired or defeated, if that challenged were sustained. Loose expressions may say, some ill-considered case may hold, that pending a suit to foreclose a lien or mortgage, one not a party can never foreclose his paramount lien or mortgage in any other court. But it is the clear result of the reasoning of all the decisions, those relied on by plaintiff in error as well as those herein cited, that such second foreclosure is only precluded when it conflicts with jurisdiction first taken in the first foreclosure; and that cannot be if no possession is or can be taken in either suit.

V

The judgment gives the right relief.

Its decision that plaintiff in error has not and never had any lien and that defendant in error holds and owns the property by title paramount to, and free and clear of, any such lien, of which its counsel complains, determines the exact issues made by the pleadings. The complaint sets out the sale of the pipe, the lien decree and marshal's deed, and the foreclosure of the mortgages, and then alleges that by the decree and deed plaintiff in error "became and now is the owner and holder of *all* the right,

title and interest which the Oconto Water Company had," on September 15, 1890, or has since acquired, "which title * * * *is prior to any lien upon or title to said plant* now or at any time held or acquired by" defendant in error. The prayer is that, because of such lien and deed, plaintiff have possession of the plant, unless defendant pay the "amount due to it under its mechanic's lien decree." (Trans. pp 15 to 17). The answer admits the foreclosure of the mortgages and avers that thereby Andrews & Whitcomb "became the owners of the property mortgaged;" and denies "that the plaintiff is the owner or holder of any right, title or interest" in the property. (Trans. pp 23, 24). It sets up the decree in the creditor's suit as *res adjudicata* "that as to defendant * * and all the world except the defendant in said [lien] decree, the plaintiff had and there could be no lien on the premises * * *; that defendant and Andrews and Whitcomb purchased, held and owned said premises and property by claim and title paramount and free and clear of any claim or lien of said plaintiff; and that, under the laws and policy of Wisconsin, * * * there was and could be no lien." (Trans. pp 27, 29). The court determined these issues for defendant in error and found that the decision in the creditor's suit determined that as to the defendant in error and Andrews and Whitcomb, plaintiff in error never had any lien, and that the issues in such suit "as to the existence and supremacy of such lien against this defendant were the same as in this case * * * and that the questions there raised became, by the decree of the court, *res adjudicata* between the parties hereto." (Trans. pp 31, 32).

That the creditor's suit did involve the issues whether plaintiff in error had any lien by the lien decree or otherwise, whether defendant in error had paramount title by its foreclosure, and whether that title embraced the plant as well as the franchise, appears by the pleadings in that suit. It is shown by the decisions in that suit. 46 U. S. App. 281, 619. It is shown by the nature of that suit. It was a creditors' suit to sequester the plant and franchises and apply them to liens according

to their priority, and to unsecured creditors. If plaintiff in error had a lien paramount to the mortgages, it would be paid first. If it had no lien, it would share only as an unsecured creditor. If the mortgage was paramount, it would share first, unless it had been validly foreclosed; and, if it had been so foreclosed, and embraced plant as well as franchise, the creditors' suit must be dismissed. The court held that the mortgage was paramount because, as against it, there was no lien; that the mortgage embraced the plant as well as the franchise, and that it had been validly foreclosed. And so the bill was dismissed.

The direct issues in the present case were, therefore, whether the plaintiff in error had any lien, as to defendant in error, and whether defendant in error held by title paramount and free from such lien. When the bill asserts a lien and that it is paramount to any title of defendant, and the answer denies the lien and alleges paramount title in defendant, the court by adjudging that complainant has no lien and that defendant has paramount title, simply *determines the issues*. No cross-bill, or counter-claim, or prayer is necessary for that. "It is not only the right but the duty of the court, when all the parties are before it, to adjudge the rights of all and leave nothing open for future litigation if it can be avoided." 5 *Enc. of Plead. and Prac.* 958. "It is a fundamental principle of courts of equity to make as complete a decision upon *all the points embraced in a cause* as the nature of the case will admit of." *Daniels Ch. Pr.* (1 Ed.) 635; 1 *Black on Judgments*, Sec. 146.

The judgment here simply follows the conclusions of law (Trans. p 32) and the opinion of the trial court. It would have been just as conclusive of the rights it determines if it had simply dismissed the bill; for the pleadings, conclusions of law and opinion could be examined to show the points determined. The determination, however, was properly embodied in the decree, to save resort to such examination.

VI

There is no right of redemption under the general prayer for relief.

No claim of such right was made or decided. And there is no such right. In the creditors' suit the court said: "The question whether appellees [plaintiff in error] as *judgment creditors* of the Oconto Water Company have a right to redeem * * does not, in our opinion, arise upon this record, and will not be prejudiced by our decision." 46 U. S. App. 619. The plaintiff in error had judgments at law for its debt, besides the lien decree, and it claimed that "by reason of these judgment liens, if not by reason of the lien decree," it had right to redeem. But the judgments at law were after the foreclosure sale, and so could give no right to redeem.

Stout vs. Lye, 103 U. S. 66.

The court could not have meant that there was a possible right to redeem because the lien decree gave a mechanic's lien; for it had decided that there was no lien by that decree or otherwise as against the mortgagees and defendant in error.

To redeem from a mortgage after foreclosure, one must have had a definite lien or interest before the foreclosure suit was begun.

Stout vs. Lye, 103 U. S. 66.
Herring vs. R'y. Co., 105 N. Y. 340.
Hallim vs. Coal Co., 150 U. S. 371, 386.
2 *Jones Mortgages, Secs.* 1048, 1049, 1055.

Plaintiff in error had no mechanic's lien in fact. This is the settled law of the state and is *res adjudicata* by the determination in the creditors' suit. The lien decree, against the Oconto Water Company only, was after the foreclosure sale. So were the judgments at law. There is no pretense of any other lien or interest in plaintiff in error. The mortgagees rightly omitted to make

plaintiff in error a party to their foreclosure, because, as the courts, state and federal, agree, it had in fact no lien and, hence, no redeemable interest. It would not have been a proper party. (See cases last cited). The right action of the mortgagees in foreclosing cannot be nulified by a subsequent wrong decision in the lien suit to which they were strangers.

The right of redemption is favored. An interest, although voidable, gives the right. The mortgagee cannot defeat the right by showing that the interest is wrongful or otherwise avoiding it, if it actually *exists* before his foreclosure. But, if there is no redeemable interest in fact at the time of foreclosure, right of redemption cannot be afterwards created by a wrong decision between strangers to the foreclosure, that such interest did exist at that time. Right of redemption cannot be favored by resort to a fiction that it existed before foreclosure, when it really did not, to defeat rights under the judicial sale.

In seeking redemption, because of the erroneous lien decree, plaintiff in error is simply returning into a court of equity, to get some benefit from such decree against one not a party to it, within the rule of *Lawrence Mfg. Co. vs. Cotton*, 138 U. S. 552. Its success would, practically, enforce its alleged mechanic's lien, against the public policy of the state as much as to sell the plant and franchise under the mechanic's lien decree; for it would take them from the domestic corporation which is the agent of the state for their operation for the public use, and give them to this foreign company.

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No. 216.
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Office Supreme Court U. S.
FILED
MAR 29 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 29, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

GEORGE G. GREENE,
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Counsel for Defendant in Error.

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Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Our original brief was necessarily prepared before that of plaintiff in error was filed. In it we assumed that plaintiff in error would make the same contention that it did in the state court. In this we were mistaken. The main propositions on which it asked reversal of the judgment of the trial court are not now asserted; doubtless because they plainly do not involve federal questions. The contentions now made by plaintiff in error are reducible to three: I. That it has title under the lien decree paramount to the mortgage title of defendant in error. II. That the state court had no jurisdiction of the mortgage foreclosure. III. That the judgment of the state court is too broad.

I.

The claim that plaintiff in error has paramount title under the lien decree is contrary to its concession in the state supreme court, as appears from the opinion of that court. (Trans., pp. 182-183.) The very nature of the action concedes the supremacy of the mortgage title. For, if plaintiff in error has the paramount title, it can not compel defendant in error to pay its debt or claim, which it seeks to do. On that theory, it would own the plant and franchise by its marshal's deed, and could recover it in ejectment.

But the judgment in the creditors' suit which was between these parties, is conclusive that the decree in the lien suit, which was not between them and does not bind them, gave no lien. It is not true that the issues in the creditors' suit and the decision of them, did not involve the supremacy of the lien and mortgage claims and titles. That was the principal controversy. Plaintiff in error asserted its lien by the lien decree and without it, and denied the validity of the mortgages and their foreclosure. Andrews and Whitcomb, in whose shoes the defendant in error stands, denied the lien, claimed they were not bound by the lien decree because not parties to it, and asserted their foreclosure title. The opinions show this.

Andrews et al. v. *National Foundry, etc.*, 46 U. S. App., 281, 619.

The decision was in favor of defendant in error on each question. 1. That the lien decree did not affect defendant in error. 2. That plaintiff in error has no lien. 3. That defendant in error has title by the mortgage foreclosure. It is suggested that the final decree on the mandate was not as broad as the opinions. But this is a mistake. It dismissed the bill as to Andrews and Whitcomb and defendant in error pursuant to the opinions. This it could not have done if plaintiff in error had a paramount lien; for then it would have been entitled to preference on distribution in the creditors' suit. Nor could the bill have been thus dismissed unless defendant in error had title by its foreclosure. For

then distribution would still be necessary, the defendant in error sharing as a mortgage creditor. But the final decree did more. It in terms decreed *the title to be in defendant in error pursuant to the mortgage foreclosure.* It decrees:

> "Fifth. That the legal title to the land upon which the pumping station and wells of the water works plant are located, which heretofore by deed dated the 31st day of January, A. D., 1894, was conveyed, by the order of this court, by the City of Oconto to the said defendant, Oconto Water Company" (here follows description of the plant), "be and the same is hereby passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, executed by said defendant, Oconto Water Company, to said defendants, S. D. Andrews and W. H. Whitcomb, and *of the sale in the proceedings to foreclose the same,* to the said defendant, Oconto City Water Supply Company as the assignee and successor in interest of the said defendants, S. D. Andrews and W. H. Whitcomb, and that the said defendant, Oconto Water Company, and its receiver, Albert E. Smith, by separate instruments, duly witnessed and acknowledged so as to entitle the same to record, execute and deliver conveyances thereof to the defendant, Oconto City Water Supply Company," etc. (Trans., pp. 144, 145.)

There is, then, against the contention that plaintiff in error has any lien or lien title, this final judgment denying such lien or title and transferring paramount title to defendant in error, as well as the repeated decisions of the state supreme court that the state statute gives no such lien, and that it is against the policy of the state that one should exist.

Claim is made that when plaintiff in error furnished materials, the state supreme court had held that the statute did give such a lien, and that these decisions were overruled by those followed in the creditor's suit. Therefore, it is argued, plaintiff in error had a vested contract right to a lien when materials were furnished, which the later decisions could not affect. But that is concluded by the judgment in the creditors' suit. The question was there directly in-

volved and fully argued. If plaintiff in error had such right under prior decisions, the judgment must have sustained and enforced it; but the court held that the "exact question" arose in the *Chapman Valve Company* case for the first time, and followed it. (46 U. S. App., 281.)

And this is clearly so. In *Hill* v. *Ry. Co.,* 11 Wis., 214. a lien was sustained against a railroad building, and in *Purtell* v. *C. F. & B. Co.,* 74 Wis., 132, against a bridge. But the first case went on the ground that the building was separable from the franchise to operate the road, and the judgment did separate them and was confined to the building only. In the second case, the statute in terms gave a lien on "any bridge" and this was held to embrace the bridge in question. Here it is plain that the franchise and plant are inseparable, and the lien decree accordingly provided for the sale of the franchise, thus in effect extending the lien to it. And the terms of the statute here can not fairly be construed to embrace a water-works plant. It confines the lien to a quarter of an acre of land, except for *labor* on a structure covering more. In this plant there are some twelve miles of pipe. In *Wilkinson* v. *Hoffman,* 61 Wis., 637, decided in 1884, the court held that in view of the language of the statute and on grounds of public policy, there could be no mechanic's lien on a water-works plant owned and operated by a city. In the *Chapman Valve Company* case, this decision was followed and applied to such a plant owned by a corporation organized and authorized to supply water to a city and its people (89 Wis., 264), on the ground that the effect on the public interests of enforcing such a lien would be the same in each case. All this was fully presented in the creditors' suit, and its decision that there was no lien is as conclusive of this question as of any other.

It is said that the answer herein does not attack the lien decree or the title claimed under it. By its 13th division the answer denies any title or interest in plaintiff in error (Trans., p. 24), and by the amendment to the answer it pleads the decree in the creditors' suit in bar. (Trans., pp. 24, 29.) It appears from the bill that defendant in error was not a party to the lien decree, and this fact is stated in

the 4th and 17th divisions of the answer. (Trans., pp. 22, 29.)

It is said that Andrews and Whitcomb were bound by the lien decree because stockholders. The contrary is directly decided in the creditors' suit (46 U. S. App., 619).

II.

The claim that the state court had no jurisdiction in the mortgage foreclosure, is sufficiently discussed in our original brief (pp. 16-21).

As we have seen, the final decree in the creditors' suit vests the title in defendant in error "by virtue of the instruments "of mortgage, dated September 13, 1890, and March 13, "1891, * * * and *the sale in the proceedings to fore-* "*close the same.*" (Trans., p. 145.) This is a final adjudication between the parties that the foreclosure was valid.

And this meets the contention of plaintiff in error that as to the second mortgage the lien decree was paramount by *lis pendens*. The decree is that defendant in error has the title by the foreclosure of *both* mortgages.

Farmers' Loan & Trust Co. v. *R. R. Co.*, 177 U. S., 51, was within the rule of *Shields* v. *Coleman*, 157 U. S., 168. It was "a case in which * * * *the express object of* "*the bill, or at least one express object, is the appointment* "*of a receiver, and where possession by such officer is neces-* "*sary for the full accomplishment of the other purposes* "*therein named.*" Besides, in that case there were the same parties in each suit.

III.

The claim that the judgment is too broad is not a federal question. But the judgment is right. In the creditors' suit the court had to determine: (1) Whether the lien decree bound Andrews and Whitcomb and the defendant in error; and (2) whether, if it did not, there was a paramount lien in truth. When it had determined the first question in the negative, it was still confronted by the second; for, if the

plaintiff in error had a paramount lien in truth, it would, to its extent, defeat the mortgage title. The second question was solved by holding that plaintiff in error had in truth no lien at all. This is *res adjudicata;* and it is just what the judgment herein determines. As to the parties to this suit, it is settled by that decree that plaintiff in error has no lien and never had any. And as this is the settled law and policy of the state, the decree is right in so affirming. But the question is sufficiently discussed in our original brief (pp. 21-25).

IV.

Counsel for plaintiff in error suggested on the argument that the question whether the Wisconsin statute gives a lien on such a plant is again raised in *Pittsburg Testing Laboratory, Limited,* v. *Milwaukee Electric Railway & Light Company,* now pending in the state supreme court. In that case counsel for plaintiff in error appears for the defendant in *resistance* of the lien. Manifestly, the determination of that case cannot affect the decision of this case. It being *res adjudicata* by the decree in the creditors' suit that there is no lien, the bar of the decree cannot be affected by a decision in another case between other parties that a lien should have been decreed.

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No. 93.

Office Supreme Court U. S.
FILED
JUL 15 1901

STATE OF WISCONSIN,

Certified Copy of Opinion of Court.

IN SUPREME COURT.

Filed July 16, 1901.

PITTSBURG TESTING LABORATORY, LIMITED,

Appellant,

vs.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, IMPLEADED WITH OTHERS,

Respondent.

93

Certified Copy of Opinion of Court.

STATE OF WISCONSIN.

IN SUPREME COURT.

PITTSBURG TESTING LABORATORY, LIMITED,

Appellant,

vs.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, impleaded with others,

Respondent.

Cassoday, C. J. This is an appeal from an order sustaining a demurrer to the complaint to enforce a sub-contractor's lien upon the premises described. The complaint, after alleging that during the times therein mentioned the plaintiff was a corporation located at Pittsburg, Pa., and that the defendant, the Milwaukee Electric Railway and Light Company, was a corporation located at Milwaukee, and organized to engage and engaged in the business of operating in the city of Milwaukee a system of street railway and an electric light and power plant, and that the defendants Warren and John Roberts were co-partners engaged in the business of civil engineers and contractors, alleges, in effect, that the electric company sells electric light and power produced at such plant, and has a contract with the city of Milwaukee for lighting certain streets therein, which contract was entered into July 15,1895, and by its terms expires December 15, 1900; that the electric company is now engaged in carrying out and completing such contract by means of its plant and appliances, *"other than the new power house hereinafter mentioned;"* that the electric company had long

prior to entering upon the construction of such new power house, constructed power houses in various parts of the city and placed therein proper engines, boilers and machinery, and has ever since operated and used and is now operating and using the same for the purpose of producing electricity; that the last named power houses and appliances therein contained are amply sufficient for the purpose of supplying with electricity and operating the system of street railways and electric light and power plants of the electric company as they have been heretofore and now are constructed and carried on and sufficient to enable it to carry out and fulfill its contract with the city until the expiration thereof; that the electric company is contemplating extensions and additions to its system of street railways and to its lightning and power plants; that to operate such systems and plants when so increased and extended as contemplated, a new power house is necessary; that for the purpose of constructing such new power house the electric company in 1898 caused plans and specifications to be prepared and made therefor by an architect of the city; that prior to February 6, 1899, Warren Roberts & Co. were employed by and entered into a contract with the electric company to perform work and labor and to furnish materials according to plans and specifications in and about the erection and construction of a brick building to be used as such new power house, owned by the electric company and situated on the land hereinafter specifically described; that in and by such contract it was provided that all the structural material used and employed in the construction of such building should be tested and inspected by this plaintiff at the expense of Warren Roberts & Co.; that prior to February 6, 1899, the plaintiff was employed as sub-contractor by Warren Roberts & Co. under their contract with the electric company, to test and inspect such structural material; that as such sub-contractor, under such employment, the plaintiff per-

formed work and labor for Warren Roberts & Co. between February 6, 1899, and August 19, 1899, that is to say, inspected and tested the structural material used and employed by Warren Roberts & Co. in the construction of such building under and pursuant to the provisions of the plans and specifications aforesaid; that the exhibits attached, contain a true and correct statement of the work, tests and inspections thus performed by the plaintiff, showing the amount of work done and the prices therefor; that such prices were the prices agreed upon between the plaintiff and Warren Roberts & Co. for the doing of such work; that all of such work and labor was done performed upon structural material which was sold and furnished to be used and which was actually used by Warren Roberts & Co., in the construction and erection of such new power house; that such new power house stands and is situated upon two lots therein described; that the electric company at the time of making such contract with Warren Roberts & Co., was and ever since has been and now is the owner of the land and of the new power house building situated thereon; that the same does not exceed one acre in extent and is within the limits of the city; that the last date of the performance of such labor of this plaintiff was August 19, 1899; that September 20, 1899, this plaintiff gave to the electric company the notice of its claim for a lien and statement thereof, of which true copies are hereto attached; that October 13, 1899, this plaintiff gave to the electric company the notice and statement of the work, tests and inspections, of which true copies are hereto attached; that November 29, 1899, this plaintiff duly filed, as required by law, its claim for lien for the amount due and owing to it from Warren Roberts & Co., in the office of the clerk of the circuit court of Milwaukee county, a copy of which claim for lien is hereto attached; that such claims and all the allegations thereof are true and are hereby made a part of this complaint; that one year has not elapsed between the doing of such

work and labor and the commencement of this action; that there is now due and owing to the plaintiff from Warren Roberts & Co., by reason of such claim $777.29, and interest thereon from August 19, 1899. Wherefore, the plaintiff demands judgment that the amount of its lien be ascertained and adjudged and enforced against such premises, with costs.

The question presented is whether the facts stated are sufficient to entitle the plaintiff to a sub-contractor's lien upon the premises described under the statutes of this state for the work and labor performed. Secs. 1775, 1775a, 3314, 3315 R. S. The statutes declare, in general terms, in effect, that the party performing such work and labor shall have a lien upon such building and the interest of the owner thereof, therein, upon complying with the provisions of such statutes. Id. It is virtually conceded that the facts alleged would entitle the plaintiff to such lien, if the premises were owned by a private party and used for private purposes. But it is claimed, and the trial court manifestly held, that such statutes are not applicable to property of a *quasi* public corporation engaged in operating a system of street railways and an electric light and power plant in the city of Milwaukee. In support of such claim counsel rely upon certain decisions of this court; and counsel for the plaintiff rely upon certain other decisions of this court in support of its claim for a lien herein. We shall not here undertake to harmonize or reconcile all of such decisions—much less all that has been said in the different opinions in support of such decisions; but we will attempt to decide this case in accordance with the principles of law applicable to the facts stated. The early case of Hill vs. the La Crosse and Milwaukee R. R. Co., 11 Wis. 214, 221, was an action to enforce a mechanic's lien for building a part of a brick block which, had it been completed according to the contract, would have extended 'along the whole front of the block, upon the street—being 420 feet and to the depth of 55 feet—and constituted the

defendant's depot in Milwaukee." The "judgment was recovered by default, and was entered for a lien upon the interest of the company in the whole block 41." On the application of the company for a modification of the judgment it was made to appear, "that the railroad track was laid across the east part of the block between the buildings and the river—that the whole block was not necessary or convenient for the use of the buildings erected which were designed for stores and offices;" and thereupon the court modified the judgment "so to confine the lien to the west 60 feet of the particular lots on which the building as far as erected actually stood." On the appeal by the plaintiff from such modified judgment, the same was reversed by this court, which held that the plaintiff was entitled to a lien upon one acre in the block; and that as the block exceeded an acre it was necessary for the court to determine to what portion of the block the lien extended; and so this court came to the conclusion, "that the lien of the appellants was equivalent to a mortgage by the company of an acre in the block, and that it should be adjudged to cover the south one acre of the block, extending from the river to the street, and that it should be so sold as to leave what remained to the company in a compact form, extending also from the river to the street." The court reached that conclusion expressly because the premises were "at the very end of the road, and where, from the very nature of the premises, it would be more convenient to both parties," that they should be so divided, in order that each party should "have access both to the river and the street." As the land was situated at the very end of the railway tracks, the lien could be thus enforced without destroying any of the corporate franchises of the company. The enforcement of the lien could at most only result in acquiring some of the property of the corporation not essential to the enjoyment of such corporate franchises. Upon that ground the decision may be sustained, although the reasoning of the opinion

may not in all respects be approved. The learned justice who wrote the opinion, in a note to the case, states that some of such reasoning was inapplicable. The decision seems to have gone largely upon the ground of the superior equity. Two years after that decision a mechanic's lien, in favor of a sub-contractor, was enforced by this court against the depot of a railroad company and a certain amount of land upon which it was situated, seemingly without reference to or consideration of, the question whether the corporate franchises of the company were thereby destroyed or impaired. Carney vs. The La Crosse and Milwaukee R. R. Co., 15 Wis. 503, 509. At the same term of the court it was held that a municipal corporation was not liable to garnishment in an attachment suit. Burnham vs. The City of Fond du Lac, 15 Wis. 193. That case was followed in Buffham vs. The City of Racine, 26 Wis. 449; and Merrill vs. Campbell, 49 Wis. 535. Upon the principle involved in those cases, it was subsequently held by this court that the lien of a sub-contractor, under the statute, did not extend to machinery furnished by him and placed in a building constituting a part of the water-works of a city. Wilkinson vs. Hoffman, 61 Wis. 637. This was not put upon the ground that the general language of the statute (sec. 3314) was not broad enough to authorize such lien, but on the grounds of public policy and because the objects of municipal government forbid that the clause of the statute referred to should be held applicable to machinery placed in a building constituting a part of the city water-works; that it stood upon the same ground as where material is furnished for a county court house, jail, public school building or other public buildings which are held to be exempt from the operation of mechanic's lien laws; and that upon the grounds of public necessity and convenience it was held that the lien did not attach. That case has been repeatedly approved by this court. The City of Platteville vs. Beil, 66 Wis. 326, 334; Chapman Valve Manufacturing Co. vs. Oconto Water

Co., 89 Wis. 264-271; Strike vs. Wisconsin O. F. M. L. Ins. Co., 95 Wis. 586. A prominent author states that: "On the grounds of public policy the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties and towns, for public use." 1 Jones on Liens, 2 ed, sec. 1375, citing many adjudications from numerous states. In support of the proposition see Leonard vs. City of Brooklyn, 71 N. Y. 498; Board of Commissioners vs. O'Connor, 86 Ind. 531. The same rule is there stated as applying to school houses and water-works so erected for public use. The "public policy" mentioned, seems to be nothing more than an enforcement of the old common law rule, as stated by Savage, C. J., that: "When a statute is general, and any prerogative right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him." The People vs. Herkimer, 4 Cowen, 348. In an earlier case in the same state it was said that: "In a representative government where the people do not and cannot legally act in a body where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent * * On the ground of expediency and public convenience, this was necessary; as an attribute of sovereignty it was equally important to be preserved." The People vs. Gilbert, 18 Johnson, 229. The rule thus stated by Chief Justice Savage was, at an early day, expressly sanctioned by the Supreme Court of the United States, and then added that: "The doctrine that the government should not, unless named, be bound by an act of limitation, is in accordance with that just cited from Bacon, because if bound, it would be barred of a right; and in all such cases, is not to be construed to be embraced unless named, or what would be equivalent, unless the language is such as to show clearly that such was the intent of the act * * * The real ground is a great

principle of public policy which belongs alike to all governments that the pubilc interest should not be prejudiced by the negligence of public officers, to whose care they are confided." U. S. vs. Knight, 14 Peters, 315. See also Savings Bank vs. U. S. 19 Wall; 239 U. S. vs. Herron, 20 Wall.263. As stated in one of these cases, the same principle has been decided in several of the states; and all upon the same ground. In some of the cases it is held, that the statutes of limitation do not run against the state unless expressly declared. The People vs. Gilbert, *supra*; Commonwealth vs.Hutchinson,10 Pa. St. 466. In other cases the rule has been applied to the discharge of bankrupts or insolvents. In the administration of government the municipality is the agency of the state. The question recurs whether the rule applicable to municipalities applies also to *quasi* public corporations. Upon that question there seems to be a diversity of opinion. 1 Jones on Liens, secs. 1378,, 1618 et seq. There can be no question in this state but what electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. They both have the right of eminent domain. Sec. 13, Art. I Con. Secs. 1845-1863a Stat. 1898. Such being the relationship between the corporation and the public, the Supreme Court of the United States has held that "Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges or other property of a railroad company that *may be essential in the operation and maintenance of its road for the public purposes* for which it was established." Buncombe County Commissioners vs.

Tommey, 115 U. S. 122. In that case Mr. Justice Harlan, speaking for the whole court, said, in effect, that "a different construction of the statute would enable parties having liens" for small amounts, "to destroy a public highway, and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature, unless the words of the statute clearly require it to be done." Id. page 129. Thus it has been held in Pennsylvania that "the results to be produced to the public by public corporations" for building bridges, turnpikes, railroads and the like "cannot be disturbed by the seizure by creditors of any part of the property *essential to their active operations.*" Foster vs. Fowler, 60 Pa. St. 27. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking and accommodate the public. Id. Such rules were applied in that case to a corporation for introducing water into a town for the accommodation of its inhabitants. Id. The principle involved in that case was approved in a later case, in the same court, "where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation." Girard Storage Co. vs. Southwork Co. 105 Pa. St. 248; and also see Guest vs. Water Co. 142 Pa. St. 610, 615; Reynolds vs. Reynolds Lumber Co. 169 Pa. St. 626. On the other hand it has been held in the same state that: "Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation." Plymouth R. R. Co. vs. Calwell, 39 Pa. St. 337. And yet in the same case, Woodward, J., speaking for the court said: "Though the cor-

poration in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation." Page 339. See also Oakland Railway Co. vs. Kernan, 56 Pa. St. 203. The rule of construction, mentioned, and some of the adjudications cited in support of it, have repeatedly been sanctioned or recognized by this court. The Yellow River Improvement Co. vs. Wood County, 81 Wis. 560-2; s. c. 17 L. R. A. 92, and note; The Fond du Lac Water Co. vs. The City of Fond du Lac, 82 Wis. 322, 329; Chapman Valve Manufacturing Co. vs. Oconto Water Co. 89 Wis. 264; C., M. & St. P. R. Co. vs. City of Milwaukee, 89 Wis. 506; The State ex. rel. Milwaukee Street R. Co. vs. Anderson, 90 Wis. 550; Wright vs. The Milwaukee Electric Ry. and Light Co. 95 Wis. 29; C. & N. W. Ry. Co. vs. Forest Co. 95 Wis. 80, 89; The State ex. rel. Badger Ill. Co. vs. Anderson, 97 Wis. 114. In a recent case Mr. Justice Marshall said: "Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense, and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation." The State, ex rel Atty. Genl. vs. Portage City Water Co., 107 Wis. 446; s. c. 83 N. W. 699. The rule to be deduced from the best considered cases, seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes. But that under the general language of such statutes a lien may be enforced against such structures and property of the cor-

poration as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In addition to the authorities cited, see National Foundry and Pipe Works vs. Oconto Water Co., 52 Fed. 43, s. c. 68 Fed. 1006; 2 Jones on Liens, 2 ed. Secs. 1618, 1619; 3 Elliott on R. R., secs. 1066-1075. In one of these sections Mr. Elliott says: "The courts will not presume that the legislature intended to subject the public to the annoyance and inconveniences which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required." Id. sec. 1066. The distinction between the cases where liens cannot be enforced against a particular structure or section of a railway, essential in its operation and maintenance for the public purposes for which it was established, and the cases where the lien may be enforced against a particular structure belonging to such corporation, but not so essential to its operation and maintenance, and hence which may be taken from the corporation without destroying or impairing its corporate franchises, have not always been observed in this court. The question is not whether the legislature may, in its wisdom, authorize the enforcement of such lien in any case, but whether the general language of our statute shall be so construed as to authorize a *pro tanto* destruction of the corporate functions created as an entirety and primarily for the benefit of the public. In other words, courts are not authorized, in the construction of such general language, to repeal *pro tanto* the charter of a corporation so created primarily for the public benefit, especially in violation of a well established rule of construction of such general statutes so far as public rights are concerned. Such rule was not observed in Carney vs. The La Crosse and Milwaukee R. R. Co. 15 Wis. 503, and the more recent case of Purtell vs. Chicago Forge and Bolt Co., 74 Wis. 132. In the case at bar it is admitted that

the defendant was engaged in carrying out and completing its contract with the city by means of its plant and appliances, "*other than the new power house*" in question. In other words, it is admitted that the new power house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric light and power plant for the public purposes for which the defendant corporation was established. It follows from what has been said, that the plaintiff is entitled to such lien.

By the Court: The order of the circuit court is reversed and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law.

STATE OF WISCONSIN, }
IN SUPREME COURT. }

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original Opinion of the Court by Chief Justice Cassoday, on file in my office in the above entitled case, and that it is a correct transcript therefrom, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 28th day of June, A. D., 1901.

{Seal of Supreme Court of Wisconsin.}

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

Supreme Court of the United States.

No. 33.—October Term, 1901.

The National Foundry and Pipe Works, Limited, Plaintiff in Error, *vs.* The Oconto City Water Supply Company. } In error to the Supreme Court of the State of Wisconsin.

[January 6, 1902.]

In January, 1890, the city of Oconto adopted an ordinance authorizing the Oconto Water Company, its successors and assigns, to construct and operate waterworks in said city. Said Oconto Water Company is hereafter referred to as the Water Company. The Water Company commenced the construction of its plant. On August 28, 1890, it contracted with the plaintiff in error, the National Foundry and Pipe Works, Limited—hereafter styled the Pipe Works—for a supply of pipe to be used in said water plant, the pipe to be delivered at intervals and to be paid for partly in cash and partly on credit.

Whilst the pipe was being delivered and placed in position the Water Company, by an instrument in writing, of date September 13, 1890, agreed with a firm known as Andrews & Whitcomb, whose members were domiciled in the State of Maine, in substance as follows:

In consideration of cash advances, to aggregate $40,000, to be made by said firm from time to time for the completion of the waterworks, the water company was to execute its promissory notes for the amount of each advance. The Water Company agreed as to collateral security as follows:

"To make an immediate transfer, in trust, to said parties of the first part (Andrews & Whitcomb), of the Oconto waterworks franchise as issued to said Oconto Water Company, together with the entire one hundred thousand ($100,000.00) dollars of stock of said Oconto Water Company, and further agrees to make an immediate issue of one hundred thousand ($100,000.00) dollars in the first mortgage bonds of the said Oconto Water Company, the same to be secured by deed of trust on the entire Oconto waterworks, franchise and all of the rights and privileges of said company in said waterwork franchise; said deed of trust to be made to some trust company to be hereafter mutually agreed upon."

About contemporaneously with the execution of said agreement a formal mortgage was given to Andrews & Whitecomb by the Water Company, upon "all the rights, privileges, immunities, franchises and powers, of whatsoever name or nature, which had been granted to it."

This mortgage was not at once placed on record, and moreover a considerable time elapsed before delivery was made to Andrews & Whitcomb of the stock and bonds provided for in the agreement previously referred to.

In the meanwhile all the pipe contracted for was delivered and the same had been used in connection with the waterworks plant. Although the Water Company was during this time obtaining money from Andrews & Whitcomb, it failed to use the money in payment for the pipe. In consequence the Pipe Works on September 15, 1890, recorded a claim for a lien on the plant of the Water Company. After the recording of this lien, and on January 13, 1891, the mortgage in favor of Andrews & Whitcomb, which, as already stated, had been executed on or about September 13, 1890, was placed on record.

On January 30, 1891, the Pipe Works filed its bill in the Circuit Court of the United States for the Eastern District of Wisconsin to foreclose its asserted lien and to procure a sale thereunder of the plant of the waterworks company and of the interest of that company in certain real estate upon which the company had constructed its pump and water wells, the legal title to the real estate being in the city, but the company having taken possession, under an agreement by which it secured the right to obtain a conveyance, from the city, upon compliance with certain conditions. To this bill the Water Company was alone made defendant. The lien asserted was contested by the defendant. This litigation will be hereafter referred to as the mechanics' lien suit.

Andrews & Whitcomb having made the advances provided in the contract of September 13, 1890, and additional advances being required, they were made by Andrews & Whitcomb under contracts executed on March 13 and May 16, 1891, of tenor like unto the September agreement, the collateral security provided under that contract being made liable for the new advances. No independent mortgage was executed.

The Water Company not having performed the stipulations made in its contracts with Andrews & Whitcomb, on June 17, 1891, that firm commenced proceedings in a court of the State of Wisconsin to foreclose an asserted lien which it claimed was created upon the franchise and property by the mortgage and contracts to which we have already referred. This litigation will be hereafter referred to as the mortgage foreclosure suit. To this suit the Water Company was alone made defendant. On August 13, 1891, a personal judgment was entered for $63,889.23 and costs, and a sale was decreed to enforce the lien declared in the following clause of the conclusions of law of the court:

"Third. In addition to such personal judgment, the plaintiffs are entitled to a further judgment decreeing, adjudging and declaring the amount thereof, together with the proper costs for the enforcement of the the same, a lien upon all of the property shown by the complaint in this

action and the proofs adduced by the plaintiff herein in support thereof to have been sold, assigned, transferred and set over or pledged to the plaintiffs by the defendant in trust and as collateral security for the repayment of the sums loaned and advanced the defendant by the plaintiffs under the contracts set forth in the complaint."

Under this decree a sale was made at public auction to Andrews & Whitcomb of the rights, privileges, immunities, franchises and powers granted to the Water Company by the ordinance of July 9, 1890, and the stock and bonds pledged as aforesaid. The sale was confirmed by the court and possession of the waterworks plant was taken by Andrews & Whitcomb. At the offering a representative of the Pipe Works notified those present that the Pipe Works claimed a paramount lien upon the property proposed to be sold and that the purchaser would take subject to its rights.

Pending the mechanics' lien suit and the sale and purchase by Andrews & Whitcomb, the Pipe Works brought an action at law against the Water Company in the Circuit Court of the United States for the Eastern District of Wisconsin, making also defendants thereto Andrews & Whitcomb, sued as garnishees. A judgment for the amount due was obtained on January 2, 1892, as against the Water Company, but the action was never prosecuted to a termination as against the garnishees.

On January 11, 1892, the Pipe Works filed in the Circuit Court of the United States a creditors' bill, based upon its judgment at law, and the return of execution thereon unsatisfied. This litigation will be hereafter referred to as the creditors' suit. The Water Company, Andrews & Whitcomb, an alleged corporation styled the Oconto City Water Supply Company, to be hereafter referred to as the Water Supply Company, as well as various parties whom it was claimed were liable as stockholders for unpaid subscriptions, and others, were made defendants. It would seem that in the original bill the Water Supply Company was averred to be a corporation and a resident or citizen of Wisconsin, but Andrews & Whitcomb denied such averment. Thereafter, in an amendment to the creditors' bill, it was alleged that subsequently to the filing of the bill the Water Supply Company had been organized, and that it claimed to have derived, through Andrews & Whitcomb, title to the rights and property of the water company, but that said claim was subordinate to the lien of the plaintiff. Whether at the time of this amendment the Water Supply Company had acquired the waterworks plant, or such acquisition was made subsequent thereto, does not appear, nor is it stated in the record that it was ever served with process.

A full statement of the grounds for the equitable relief asked for in the creditors' bill is contained in the opinion in *Andrews* v. *National Foundry & Pipe Works, Limited*, reported in 78 Fed. Rep. 167. It suffices here to say that the bill assailed the validity of the mortgages to Andrews &

Whitcomb and the transfer of stock and bonds to them, and attacked their foreclosure sale, and asserted the liability, as stockholders, of Andrews & Whitcomb and others for unpaid subscriptions to the stock of the Water Company. A receiver was asked to take possession of and operate the waterworks plant, then in the possession of Andrews & Whitcomb, and an injunction was prayed to restrain Andrews & Whitcomb from holding, managing or interfering in any way with the rights, franchises, plant, property, rents, profits, bonds and affairs in the hands of said receiver, and from asserting any right, title or interest in the property or the rents, issues and profits thereof until the further order of the court.

The mechanics' lien suit culminated on October 3, 1892, in a decree in favor of the Pipe Works, recognizing its mechanics' lien for the amount of pipe unpaid for, and a sale was decreed to satisfy such indebtedness. The conclusions of the Circuit Court were supported by an elaborate opinion holding that, under the laws of the State of Wisconsin, a lien existed which it was the duty of a court of equity to enforce. (52 Fed. Rep. 43.) From the decree thus rendered an appeal was prosecuted to the Circuit Court of Appeals for the Seventh Circuit.

On October 10, 1892, the Circuit Court, in the creditors' suit, appointed a receiver and allowed a preliminary injunction. (52 Fed. Rep. 29.) From the interlocutory decree granting an injunction an appeal was prosecuted to the Circuit Court of Appeals for the Seventh Circuit.

On November 7, 1893, the Court of Appeals for the Seventh Circuit (Woods, Circuit Judge, and Bunn and Baker, District Judges, sitting) affirmed the decree of the court below in the mechanics' lien suit, in which decree had been declared the existence of the mechanics' lien asserted by the Pipe Works. The court in a *per curiam* opinion adopted the reasons expressed by the lower court. (18 U. S. App. 380; 59 Fed. Rep. 19, 20.)

On January 11, 1894, the Circuit Court of Appeals determined the appeal taken by Andrews & Whitcomb from the interlocutory order granting an injunction in the creditors' suit. The lower court was reversed, the court holding, for the reasons expressed in its opinion, that the contracts made between the Water Company and Andrews & Whitcomb were not *ultra vires* or otherwise invalid, and that there had been no legal justification for the allowance of an injunction. The court said, however, (p. 472): "Whether or not, and to what extent, the mortgage of the franchises covers the plant of the company, need not now be considered." After the filing in the Circuit Court of the mandate from the Circuit Court of Appeals in such cause the Pipe Works amended its bill by setting up the final decree it had obtained on October 3, 1892, in the mechanics' lien suit affirmed as above stated by the Circuit Court of Appeals. Such lien it was averred was paramount to any rights asserted by Andrews & Whit-

comb or their privies. To the bill and amendment Andrews & Whitcomb filed separate and elaborate answers. Without going into detail, the answers asserted the validity as mortgages of the instruments executed by the Water Company in favor of Andrews & Whitcomb and their operative force upon the property and franchises, denied any liability of the members of said firm as stockholders, and asserted that they were not bound by the decree in the mechanics' lien suit, because they were neither parties nor privies to that action, and they further claimed that under the statutes of Wisconsin no lien could arise in favor of one furnishing materials or supplies in connection with waterworks, and that the decision of the Federal court to the contrary was erroneous, as the Supreme Court of the State of Wisconsin had, since the decision rendered by the Federal court, held that no mechanics' lien could be created by such a transaction.

Upon these issues and similar issues joined upon certain interventions of creditors asserting mechanics' liens upon the property of the Water Company, which it is unnecessary to refer to, a decree was entered on July 17, 1895, granting all the relief demanded by the Pipe Works Company and the intervenors. (68 Fed. Rep. 1006.)

The court held, first, that there was a mechanics' lien in favor of the Pipe Works; that whilst it was true that, subsequent to its decision in the mechanics' lien suit, the Supreme Court of Wisconsin had decided that a mechanics' lien could not arise, on the plant of the waterworks, under the circumstances disclosed, the Federal court was not bound by such interpretation of the State statute, and it adhered to its own previous conclusion to the contrary; second, that Andrews & Whitcomb were in legal effect the owners of all or nearly all the stock and liable for the unpaid subscriptions thereon to the extent necessary to pay the debts of the Water Company; third, that as stockholders said firm were bound by the decree in the mechanics' lien suit, because, as stockholders, they were privies to the decree; fourth, that assuming the validity of the mortgage in favor of Andrews & Whitcomb, yet as it was recorded subsequent to the time when the mechanics' lien in favor of the Pipe Works became operative, the mortgage was subordinate to such mechanics' lien; fifth, that the bonds issued by the Water Company and which were delivered to Andrews & Whitcomb and a defendant trust company were void; and, sixth, that the instruments executed in the name of the Water Company in favor of Andrews & Whitcomb were made in good faith and for a valuable consideration, and were not withheld from record by the consent or procurement of Andrews & Whitcomb nor in fraud of creditors.

An appeal was prosecuted by the city of Oconto, by Andrews & Whitcomb, and also by the Water Supply Company, as the successor in interest of Andrews & Whitcomb, by reason of having acquired, pending the suit, the rights of the firm in the matter in controversy. On this appeal, the Circuit Court of Appeals—Woods and Showalter, Circuit Judges, and

Seaman, District Judge, sitting—first considered whether the alleged mechanics' lien existed in favor of the Pipe Works. The court declared that by the authority of the thing adjudged, resulting from the decree in the mechanics' lien suit, the existence of such a lien was established as between the Pipe Works and the Water Company. Coming to consider whether the lien existed as between the Pipe Works and Andrews & Whitcomb and their privies, the Water Supply Company, the court held that in as much as the Supreme Court of the State of Wisconsin, interpreting the statutes of Wisconsin, since the decision of the Circuit Court of Appeals in the mechanics' lien suit, had held that no mechanics' lien was authorized by such statutes against the plant of the Water Company, the Federal court should follow the construction of the Wisconsin statute announced by the highest court of the State, even though in doing so it became necessary to take a different view from that which the court had previously announced. The Circuit Court of Appeals therefore decided that there was no mechanics' lien in favor of the pipe works or any of the intervenors as against Andrews & Whitcomb or the Water Supply Company.

Approaching next the consideration of the correctness of the ruling of the Circuit Court, that Andrews & Whitcomb were privies to the decree against the water company in favor of the Pipe Works, because they were stockholders in the company, the court decided that whilst undoubtedly a stockholder was a privy to actions against the corporation in which he was a stockholder, when brought upon money demands asserted against the corporation, yet, as Andrews & Whitcomb held the stock of the Water Company, not as subscribing stockholders, but as contract creditors of the Water Company, the principle upheld by the lower court had been erroneously applied, and therefore Andrews & Whitcomb were not privies to the decree recognizing the mechanics' lien and were in no respect bound thereby. In so far as it had been decided by the court below that the mortgage to Andrews & Whitcomb was subordinate to the mechanics' lien, because recorded subsequently to the placing on record of the affidavit as to such lien, the court said (46 U. S. App. 295): "The lien decrees out of the way all questions concerning the recording of that mortgage and the antecedent contracts disappear."

The grounds upon which the lower court held that Andrews & Whitcomb were liable as stockholders to make payment of unpaid subscriptions were reviewed and held to be unfounded. The validity of their mortgage for the whole amount of their debt and the paramount nature of its lien was recognized, and the court held that it was unnecessary to determine whether the mortgage bonds were valid, because as the mortgage for the debt to Andrews & Whitcomb, for which the bonds were merely collateral, was recognized and enforced it became unnecessary to consider that subject. In respect to the title of Andrews & Whitcomb, the court

for reason stated, said (46 U. S. App. 299): "We are of the opinion that, under the circumstances, the mortgage of the franchise carried with it the water plant."

The decree of the lower court was reversed and the cause remanded with instructions to dismiss the bill. The opinion of the court is reported in 46 U. S. App. 281, and 76 Fed. Rep. 166.

In an opinion reported in 46 U. S. App. 619, and 77 Fed. Rep. 774, a petition for a rehearing was denied. Among other things the court reiterated its previous ruling that the mortgage to Andrews & Whitcomb of the franchise extended to the waterworks plant, and that Andrews & Whitcomb were not concluded by the mechanics' liens decrees, and hence though purchasing at public auction upon the sale under the foreclosure proceedings, during the pendency of the mechanics' lien foreclosure suit the firm was not as to the latter proceeding in the category of a purchaser *pendente lite*, and the doctrine of *lis pendens* did not apply. In the course of the opinion the court said (46 U. S. App. 624):

"The question whether appellees, as judgment creditors of the Oconto Water Company, have a right to redeem from the sale made to Andrews & Whitcomb upon their foreclosure decree, to which the appellees were not parties, does not, in our opinion, arise upon this record, and will not be prejudiced by our decision."

And taking notice of this court's own records, it is to be observed that after the denial by the Circuit Court of Appeals for the Seventh Circuit of the petition for a rehearing in the creditors' suit, application was made to this court for a writ of certiorari, which was refused on April 26, 1897. (166 U. S. 721.) Subsequently in the Circuit Court of Appeals, on motion by appellants "that mandate should direct that provision be made in the decree for the conveyance to appellant Oconto Water Supply Company of the legal title to the land holding the pump station and wells of the waterworks plant," the court on May 18, 1897, overruled the motion with leave to the court below to make necessary and proper orders for the transmission of the legal title to the property.

After receipt of the mandate of the Circuit Court of Appeals, the Circuit Court, on July 29, 1897, entered a decree consisting of eight numbered clauses. The sixth, seventh and eighth embodied a decree against one Sturtevant, (against whom a decree *pro confesso* had been entered,) holding him liable in the sum of ninety-nine thousand dollars for unpaid subscriptions and ordering payment of the sum due the pipe works and the intervening and unsecured creditors and the costs of the action. The decree, so far as it affected the other defendants, is as follows:

"This cause came on to be reheard upon the record herein and upon the mandates of the United States Circuit Court of Appeals for the Seventh Circuit upon the appeals from the decree entered herein on the 17th day

of July, 1895, taken by the said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company, and The City of Oconto, which said mandates have heretofore been filed herein, and, after argument of counsel, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

"First. That the decree of said court of July 17, 1895, do stand as entered, except that as to said defendants, S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company and city of Oconto, the bill of complaint herein be, and the same is hereby, dismissed for want of equity, with costs in favor of said defendants, taxed at the sum of one thousand eight hundred and twenty $\frac{35}{100}$ dollars, except that the defendant Oconto City Water Supply Company is required to pay the amount adjudged in said decree or judgment in favor of Albert E. Smith, receiver, being the sum of twenty-five hundred dollars ($2,500.)

"Second. That said bill of complaint be, and the same is hereby, dismissed as to the defendants Charles C. Garland, F. H. Todd, Matt. S. Wheeler, A. J. Elkins and N. S. Todd for want of service of process upon them, but without costs.

"Third. That a decree *pro confesso* having been heretofore entered against the said defendants, Minneapolis Trust Company, Oconto National Bank and S. W. Ford, all of which said defendants were duly served with process or duly appeared herein, the said bill be, and hereby is, dismissed as to said defendants, but without costs.

"Fourth. That the clerk of this court be, and he is hereby, directed to restore to the defendants S. D. Andrews and W. H. Whitcomb the possession of all the bonds secured by the mortgage or trust deed of the Oconto Water Company dated the 1st day of November, 1890, which were deposited with said clerk by said Andrews and Whitcomb; that such restoration by said clerk to said Andrews and Whitcomb is, and shall be, without adjudging the validity or invalidity of the said bonds in their hands or the issue of the same by said Oconto Water Company.

"Fifth. That the legal title to the land upon which the pumping station and wells of the water works plant are located, which heretofore by deed dated the 31st day of January, A. D. 1894, was conveyed by the order of this court by the city of Oconto to the said defendant, Oconto Water Company, the description of which said land is more fully set out in said deed as follows, to wit: . . . be, and the same is hereby, passed and transferred by virtue of the instruments of mortgage dated September 13, 1890, and March 13, 1891, executed by said defendant, Oconto Water Company, to said defendants, S. D. Andrews and W. H. Whitcomb, and of the sale in the proceedings to foreclose the same to the said defendant, Oconto City Water Supply Company, as the assignee and successor in interest of the said defendants, S. D. Andrews and W. H. Whitcomb, and that the said defendant, Oconto Water Company, and its receiver, Albert E. Smith, by separate instruments duly witnessed and acknowledged so as to entitle the same to record, execute and deliver conveyances thereof to the defendant, Oconto City Water Supply Company, but without prejudice to any rights which said complainant or said R. D. Wood & Company may have under their said mechanics' lien decrees or otherwise to redeem from said instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same."

Although the decree rendered in favor of the Pipe Works in its mechanics' lien foreclosure suit authorized a sale of the waterworks plant to enforce the lien found to exist, no sale had taken place up to the time the creditors' suit was decided by the Circuit Court, because of a restraining order preventing such sale. When, however, the Circuit Court entered its decree in favor of complainant in the creditors' suit, the fifth clause thereof was couched in the following language: "Fifth. The complainant and R. D, Wood" (an intervening creditor claiming under an alleged mechanics' lien decree) "are authorized to proceed to the enforcement and satisfaction of their respective liens in accordance with their several decrees." The right thus recognized was suspended by the appeal which was taken to the Circuit Court of Appeals.

When the mandate of the Circuit Court of Appeals in the pipe works creditors' suit came to the Circuit Court it would seem some difficulty arose as to the form of the decree, and in consequence the court filed a memorandum opinion which we find printed in the brief of counsel for the plaintiff in error. The sixth clause of that memorandum, which indicates the reasons by which the Circuit Court was led to the conclusion that in executing the mandate of the Circuit Court of Appeals it was unnecessary to insert in the final decree of the Circuit Court a positive inhibition against any further attempt on the part of the pipe works to enforce, as against Anderson & Whitcomb and the Water Supply Company, its alleged mechanics' lien, if it possessed any, is as follows:

"Sixth. The order of March 5, 1894, restraining the marshal from proceeding to sell under the mechanics' lien decree, was superseded by the fifth clause of the decree of July 17, 1895. There would seem to be no necessity for further order in respect thereto. If the contention of the complainant that the mechanics' lien decree took precedence of subsequent mortgages was not disposed of by the Court of Appeals, it should be placed in a position to be able to redeem from the sale under the mortgages to Andrews & Whitcomb. If that contention was disposed of by the Court of Appeals, a sale under the mechanics' lien decree can do no harm to Andrews & Whitcomb or their successor in interest, beyond possibly creating a cloud upon their title. The court would not, however, permit this to be done if it was clear from the several opinions of the Court of Appeals that the contention in that respect had been determined.

"I cannot spell out from the opinions of that court that the precise contention had been considered and determined, unless it must be held to have been so determined by the fact of the reversal of the decree of this court and the dismissal of the bill for want of equity as against Andrews & Whitcomb and their successor in interest."

After the entry in the creditors' suit of the final decree of the Circuit Court, the Pipe Works directed the marshal to execute the order of sale contained in the decree of October 3, 1892, in the mechanics' lien suit. On August 23, 1897, in said suit, sale was made to the Pipe Works

of the waterworks plant and all the right, title and interest of the Oconto Water Company in and to the premises upon which the same were located, together with the franchise of maintaining and operating said plant. A day or two afterwards the sale was confirmed by the Circuit Court, and a deed was executed and delivered by the marshal to the Pipe Works, who caused the same to be recorded.

On December 28, 1897, the Pipe Works commenced the present action in a State court in Wisconsin, naming as sole defendant the Oconto City Water Supply Company. The complaint contained averments as to the incorporation of the defendant, the sale and delivery of pipe by the plaintiff to the Oconto Water Company, the decree of October 3, 1892, in the mechanics' lien suit and the sale to and purchase by it in August, 1897, under such decree. The making by the Water Company to Andrews & Whitcomb of the alleged mortgages or pledges heretofore referred to was next averred, as also the proceedings instituted by Andrews & Whitcomb culminating in the foreclosure of said mortgages and the sale thereunder to Andrews & Whitcomb, and the taking possession by virtue of such sale of the plant and its transfer thereafter by Andrews & Whitcomb to the defendant, the Water Supply Company. It was also alleged that Andrews & Whitcomb, prior to the making of the mortgages or pledges in question, had knowledge of the fact that plaintiff had furnished to the Water Company pipe as aforesaid for use in its plant, and that Andrews & Whitcomb, prior to the commencement of their foreclosure suit, knew that plaintiff had filed its claim for a mechanics' lien upon the plant of the Water Company and had commenced proceedings for the enforcement of such lien. It was also averred that the Water Supply Company, when it took possession of the plant, had knowledge or notice that the pipe furnished had not been paid for and that proceedings were pending to enforce a mechanics' lien therefor. The specific averment was made that the title acquired by the Pipe Works under its mechanics' lien foreclosure proceeding was prior to any lien upon or title to said plant then or any time held or acquired by the Water Supply Company. The prayer for relief, as amended, was as follows:

"Wherefore said plaintiff demands judgment against said defendant for the value of said pipe and materials furnished to said Oconto Water Company and for the amount of its said lien against the property of said Oconto Water Company; that the possession and use of said plant be given to it, and that said defendant, its officers, servants and agents, may be perpetually enjoined from occupying, possessing or using the same and any of the pipe so furnished by said plaintiff and being a part of the water plant or system now operated by it, or that said defendant, its officers, servants and agents, may be enjoined from occupying, possessing, or using said plant or any of the pipe so furnished by said plaintiff for said plant, unless within such reasonable time as said court may prescribe for that purpose said defendant shall pay to said plaintiff the amount due to it

under its mechanics' lien decree, as hereinbefore set forth, and that said defendant be ordered and required to pay the amount of said plaintiff's judgment against said Oconto Water Company and against said defendant herein in such manner as to this court shall seem just and pursuant with its equitable powers and in accordance with the practice in such cases, and said plaintiff prays for such other, further or different relief as to the court shall seem just and proper, and for the costs of this action."

In the answer filed on behalf of the Water Supply Company, the averments of the complaint that the Pipe Works was the owner or holder of any right, title or interest in or to the said waterworks plant or any pipe constituting a part of said plant, was traversed. By leave of court an amendment was filed to the answer, in which the defendant set up the plea of *res judicata* arising from the decree of the Circuit Court of Appeals in the creditors' suit. The case was tried by the court without a jury, special findings of fact were made respecting the judgment in the creditors' suit, the conclusions of law being embodied in the following decree:

"It is adjudged that the plaintiff has not and never had any lien on the waterworks plant and property on which it claims such lien by its complaint in this action; that the defendant holds and owns said plant and property by claim and title paramount to and free and clear of any claim or lien of the plaintiff; that the plaintiff is not entitled to any relief demanded in the complaint, as amended or otherwise.

"It is further adjudged that this action be, and the same is hereby, dismissed for want of equity, and that the defendant do have and recover of and from the plaintiff the sum of sixty-three and $\frac{92}{100}$ dollars, its costs and disbursements in this action."

On appeal, the Supreme Court of Wisconsin affirmed the judgment of the trial court. (105 Wis. 48.) A writ of error from this court was allowed by the Chief Justice of the Supreme Court of Wisconsin. It was therein recited that in this suit there "was drawn in question the validity and binding effect of a title, right and privilege claimed by the said National Foundry and Pipe Works, Limited, under authority exercised under the United States, and decrees duly entered in the Circuit Court of the United States for the Eastern District of Wisconsin," and that "the decision of the said Supreme Court of the State of Wisconsin was against the right and privilege specially set up by said National Foundry and Pipe Works, Limited, under said authority and decrees."

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

In order to clearly present the simple issue arising on this record for decision we have been obliged to make the foregoing lengthy statement of the facts which are involved in this unnecessarily protracted litigation.

When the allegations of the complaint by which this action was commenced are ultimately resolved, all the rights which they assert are embraced within the following propositions:

1. A contention that the Water Supply Company, by virtue of its acquisition from Andrews & Whitcomb, was a mere successor corporation of the original Water Company, and became bound for all its indebtedness, including, of course, the debt due the Pipe Works, and this irrespective of the existence of a mechanics' lien;

2. A claim that in virtue of the sale made in the mechanics' lien suit after the decision of the Circuit Court of Appeals in the creditors' suit and the final entry and execution of the mandate, the Pipe Works became the owner of the waterworks plant, entitled to the possession of the same, with a right, however, in the defendant as a junior lienholder to redeem by paying the indebtedness due the Pipe Works; and,

3. An assertion that if the Pipe Works had not become the owner of the waterworks plant in virtue of the sale made as just stated, that corporation, in any event, in virtue of its asserted mechanics' lien, had been vested with a paramount right as against the Water Supply Company, which it was the duty of a court of equity to enforce by compelling payment by the defendant.

In effect, these questions were all concluded adversely to the plaintiff in error by the court below, the rights embraced in the first proposition were decided to be without merit because the facts disclosed the Water Supply Company to be an independent corporation and not bound as a successor company for the indebtedness of the original Water Company. As this proposition does not involve a Federal question, we may not review it. Indeed, the finality of the decision below on the subject is recognized by the plaintiff in error, since the assignment of error made in this court seeks to raise no question on such subject.

All the rights asserted by the plaintiff in error which are embraced in the second and third propositions were decided adversely below, on the ground that they were not open to inquiry, because concluded by the presumption of the thing adjudged, arising from the final decree in the creditors' suit. And it is upon the asserted erroneous application by the court below of the plea of *res judicata* that all the Federal questions urged must, in effect, depend.

The proposition is that the court below denied due effect to a decree of the Federal court, by maintaining the plea of *res judicata* predicated on a decree of such court. This contention, apparently, is not that due effect was denied to the decrees of a Federal court, but that too great an effect was given. When, however, the proposition is stripped of the seeming confusion which arises from the form in which it is stated, it becomes clear that, ultimately considered, it really involves the assertion that the court

below refused to give due effect to the decree of a Federal court. This is so, because the proposition substantially is that the State court in maintaining the plea of *res judicata* resulting from the decree in the creditors' suit denied the rights which were vested in the Pipe Works by virtue of the decree in the mechanics' lien suit. The argument in substance is therefore that as the rights under the mechanics' lien decree were not impaired or destroyed by the decree in the creditors' suit, the consequence of erroneously deciding that they were obliterated by the decree in the creditors' suit was to refuse to give due effect to the rights vested in the water company as a result of the decree in its favor in the mechanics' lien suit.

As it is thus demonstrated that the determination whether the court below correctly applied the plea of *res judicata* necessitates our deciding whether due effect was given to the decree in the mechanics' lien suit, a Federal question is presented which it is our duty to determine. (*Jacobs* v. *Marks*, 182 U. S. 583, 587; *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 645; *Pittsburg &c. R. Co.* v. *Long Island Loan & Trust Co.*, 172 U. S. 493, 507, and cases cited.)

In order to correctly decide what was concluded by the decision of the Circuit Court of Appeals in the creditors' suit and the final decree entered in such cause, it must be ascertained who were the parties to that cause, what were the issues therein presented for adjudication and what was decided thereon. It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court in order to throw light upon the subject. (*Baker* v. *Cummings*, 181 U. S. 117; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 684, 688.)

Conceding for the present that the face of the final decree in the creditors' suit leaves uncertain exactly what was concluded, we will resort to the means of elucidation just referred to, viz., the pleadings and opinions rendered, in order to ascertain who were the opposing parties, what were the issues joined between them and the matters finally determined in the cause. So doing, it appears that the parties to the cause were the Pipe Works on the one side and Andrews & Whitcomb and the Water Supply Company and others on the opposing side. It also appears that the following, among other controversies, were directly at issue in the cause:

1. Had the Pipe Works, as to Andrews & Whitcomb and their privies, a lien upon the plant and franchise of the waterworks, arising from the sale of the pipe, the recording of the claim for a lien and the recognition of such lien in the decree of the Circuit Court of the United States in the mechanics' lien suit, and this although the plant and franchise had come into the possession of Andrews & Whitcomb under the sale in their mortgage foreclosure suit?

2. Was the mortgage referred to a valid instrument? and,

3. Was title vested in Andrews & Whitcomb to the waterworks plant and franchise by reason of the sale to them under the decree in the mortgage foreclosure suit?

Between the parties we have named and upon the issues just stated it is free from doubt that it was decided that Andrews & Whitcomb were lawfully in possession in virtue of the sale made in the mortgage foreclosure, and that under the law of Wisconsin there was no lien in favor of the Pipe Works as against Andrews & Whitcomb or their assigns upon the franchise and plant in question arising either from the law of that State, the recording of the alleged lien or the decree rendered in the mechanics' lien suit. It hence results that every claim of a Federal right here asserted is without merit and that the court below, in enforcing the principle of the thing adjudged, did not err, and of course did not refuse to give due effect to the mechanics' lien suit decree.

It is insisted, however, that although these conclusions may be inevitable from a consideration together of the pleadings, the opinions and the final decree in the creditors' suit, the contrary result is impelled if merely the final decree entered by the Circuit Court upon the mandate of the Circuit Court of Appeals is taken in view. The argument is that as the decree is unambiguous it is the law of the case, and resort cannot be had to other sources of information. In effect, the contention comes to this, that although it may be patent that the issues between the parties, as above stated, were determined, yet as the decree entered by the Circuit Court failed to express such conclusion, the parties are bound by the decree as entered, as they did not avail themselves of a proper remedy, by mandamus or otherwise, to correct the frustration of the results of the decisions of the Circuit Court of Appeals, which the argument necessarily assumes must have been brought about by the decree made by the Circuit Court.

But the decree of the Circuit Court does not support the contention based upon it. That decree, in express terms, dismissed the creditors' bill as to Andrews & Whitcomb and the Water Supply Company, for want of equity, without any qualification or reservation whatever. It in express terms passed the legal title to the real estate upon which was located the pumping station and wells of the Water Company to the Water Supply Company, as the assignees of Andrews & Whitcomb, such transfer of title being declared to be made by virtue of the mortgage to Andrews & Whitcomb and the sale to them in their mortgage foreclosure suit. It is true that in the clause making this transfer it was declared that it was "without prejudice to any right which said plaintiff . . . may have under their mechanics' lien decree or otherwise to redeem from said instruments of mortgage or either of them or from the sale under the proceedings to

foreclose the same." But this was a mere reservation of the right to redeem, if any existed. It left the Pipe Works in the position where, if its right had not been foreclosed as the necessary consequence of the dismissal of the bill for want of equity, it would not be so foreclosed in consequence of the specific direction for the transfer of the legal title to the property. In other words, the Circuit Court, in complying with the positive directions of the Circuit Court of Appeals, but refused to interpret specifically the scope and effect of the mandate of the appellate court, and left that mandate to operate in its own language. At best, the reservation, when considered in connection with the other portions of the decree, can only have the effect of creating an uncertainty as to what was intended, and this being the case, resort to the proper sources of information, to which we have already alluded, dispels the doubt and leaves the matter free from difficulty. And this conclusion is equally made imperative by a consideration of the memorandum opinion of the Circuit Court—set out in our statement of the case—relating to the drawing of the proposed final decree. From that document it is made clear that the Circuit Court simply declined, in drawing the decree, to construe the opinions of the Circuit Court of Appeals, and therefore deemed that it discharged its duty by obeying the mandate to dismiss the bill for want of equity, without adding any provision which might be construed as adding to or taking away from either of the parties to the record any right which had been established in virtue of the judgment of the Circuit Court of Appeals.

Another contention remaining to be considered is that even though the court below correctly applied the principle of *res judicata*, it yet, in granting affirmative relief, declined to give due effect to the decree in the mechanics' lien suit. On this subject the argument is that although as regards Andrews & Whitcomb and the Water Supply Company, it be recognized that it had been conclusively determined that the Pipe Works had no mechanics' lien whatever, yet as such lien was finally decreed in the creditors' suit as against the Water Company, because of the thing adjudged arising from the decree in the mechanics' lien suit, therefore a right to redeem from the sale to Andrews & Whitcomb existed, and such right was nullified by the broad grant of affirmative relief made in this cause by the court below. Whether the pleadings in the cause justified a grant of affirmative relief, considered as a mere question of practice, presents no Federal question. The claim that because by the thing adjudged it is indisputable that the Pipe Works had a lien against the Water Company, it therefore follows that there is still a right to redeem as against Andrews & Whitcomb and the Water Supply Company, even although it was established by the effect of *res judicata* arising from the creditors' suit, that the lien as to the parties named was inoperative and a

nullity, is but another form of asserting that the decree in the creditors' suit was not *res judicata* between the Pipe Works and Andrews & Whitcomb and the Water Supply Company.

In conclusion, we need only remark that the observations just made are equally applicable to the elaborate contention, in the brief of counsel, that as the mechanics' lien suit was pending in a Federal court when Andrews & Whitcomb instituted their foreclosure proceedings in the State court, the Federal court had exclusive jurisdiction of the *res*, and the State court was without power in the premises. The validity of the title claimed by Andrews & Whitcomb to have resulted from the sale to them in the mortgage foreclosure suit having been an issue and decided in the creditors' suit, the contention now being noticed and all other grounds supposed to establish the invalidity of such title should have been presented in the creditors' suit, and such as were not must be deemed to have been waived, and were concluded and foreclosed by the judgment rendered in such issue. (*Dowell* v. *Applegate*, 152 U. S. 327, 343.)

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.